(15,071.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 130.

GEORGE A. EDDY AND H. C. CROSS, AS RECEIVERS OF THE MISSOURI, KANSAS AND TEXAS RAILWAY, PLAINTIFFS IN ERROR,

vs.

BEN. F. LAFAYETTE AND SALLIE M. HAILEY, DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the January session, A. D. 1892, of the October term, A. D. 1891, begun and held at the city of St. Louis, Missouri, on the second Monday in January, 1892, it being the eleventh day of January, A. D. 1892, before the Honorable Henry C. Caldwell, circuit judge; Honorable Oliver P. Shiras, district judge, and Honorable Amos M. Thayer, district judge.

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the nineteenth day of October, A. D. 1891, a transcript of record from the United States court in the Indian Territory, in pursuance to a writ of error, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit; which said transcript of record is in the following words, to wit:

2 THE UNITED STATES OF AMERICA, *ss:*

United States Court, Indian Territory, First Judicial Division.

Pleas in the United States court in the Indian Territory and for the first judicial division thereof, in the cause numbered 765, and entitled Ben. F. Lafayette and Sallie M. Hailey against George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway.

——— ———, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

Indian Territory, First Judicial Division.

Be it remembered that on the 17th day of March, A. D. 1890, there was filed in the office of the clerk of the United States court in the Indian Territory, at Muscogee, in the said Indian Territory, a complaint by Ben. F. Lafayette and Sallie M. Hailey against George A. Eddy and Harrison C. Cross, receivers of the Missouri, Kansas and Texas Railway; which complaint is in words and figures as follows, to wit:

"*Complaint at Law.*

In the United States Court for the Indian Territory.

SALLIE M. HAILEY and BEN. F. LAFAYETTE, Plaintiffs,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of Missouri, Kansas and Texas Railway, a Corporation, Defendants.

The plaintiff, Ben. F. Lafayette, white, and residing in the Indian Territory, and plaintiff, Sallie M. Hailey, an Indian, and residing in the Indian Territory, alleges that defendants, Geo. A. Eddy and

H. C. Cross, white men, were at the time hereinafter mentioned and are now the receivers of the Missouri, Kansas and Texas railway, a duly incorporated railroad company doing business in the Indian Territory, and operating its railroad through the Indian Territory under and by virtue of the laws of the United States, and that said Geo. A. Eddy and H. C. Cross were on the — day of —— duly appointed as receivers of said railroad by the circuit court of the United States for the eighth judicial circuit. That said railroad is located near the premises of said Sallie M. Hailey in the Indian Territory, its right of way being 100 feet in width along the line of said road and on either side of its track, and *and* on the 20th day of August, 1889, said defendants, contrary to their duty in that regard, carelessly and negligently omitted to keep said right of way clear and free of dry and combustible material, but negligently permitted large quantities of dry grass and weeds to accumulate
2½ over and upon their said track and right of way near the premises of the plaintiff. That on the said day the defendants were operating and running over its road an engine (No. 63) which was of unskillful and defective construction and was not supplied with the best appliances and contrivances for arresting sparks and preventing the emission of coals of fire from its smokestack, and that on said day the servants, agents and employés of said defendants in operating and running said engine over said line of road near the premises of plaintiff, Sallie M. Hailey, in said Indian Territory, negligently and carelessly permitted said engine to cast out sparks and coals of fire therefrom into the dry grass and other combustible material on defendant's right of way and set fire thereto, which spread onto and over the said land of the plaintiff, the fire being continuous. That plaintiffs, Sally M. Hailey and Ben. F. Lafayette, were jointly putting up, curing, etc., and had cut, cured and put — large quantities of hay for sale, in the proceeds and profits of which sale they were to share in certain proportions; and said fire catching as aforesaid on defendants' right of way, spread rapidly onto the premises of said plaintiff, Hailey, and to the hay of said plaintiff, and burned up and destroyed six hundred and sixty-six and a half (666½) tons of hay, the property of the plaintiffs, to the value of four dollars ($4) per ton, without any fault or negligence on the part of plaintiffs, to their damage in the sum of $2,666. Wherefore plaintiffs pray judgment against the defendants for the sum of $2,666, and the costs of this action, and for other relief.

SANDELS, WARNER & HUTCHINGS,
Attorneys for Plaintiff."

W. T. Hutchings says he is attorney for plaintiff, Sally M. Hailey, who is now absent from Muskogee district, Creek nation, and Illinois or Canadian district of Cherokee nation, and that he believes the statements in the foregoing complaint are true.

W. T. HUTCHINGS.

Subscribed and sworn to before me this 17th March, 1890.

[SEAL.] WM. NELSON, *Clerk.*

Indorsed: "765. Ben. F. Lafayette and Sallie M. Hailey *vs.* Geo. A. Eddy and H. C. Cross, rec'rs M., K. & T. railway. Complaint at law. Filed Mar. 17, 1890. Wm. Nelson, clerk. S., W. & H., att'ys for pl'ffs."

Afterwards, to wit, on the same day, there was issued by the said clerk of the United States court in the Indian Territory a writ of summons, directed to the said defendants, George A. Eddy and H. C. Cross, which is in words and figures as follows, to wit:

3 UNITED STATES OF AMERICA, }
Indian Territory. }

The President of the United States of America to the marshal of the Indian Territory:

You are commanded to summons George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, a corporation, to answer, on the first day of the next April term of the United States court for the Indian Territory, being the 7th day of April, A. D. 1890, a complaint filed against them in said court by Sallie M. Hailey and Ben. F. Lafayette, and warn them that upon their failure to answer, the complaint will be taken for confessed; and you will make due return of the summons on the first day of the next April term of said court.

Witness the Honorable James M. Shackelford, judge of
[SEAL.] said court, and the seal thereof, at Muscogee, Indian Territory, this 17th day of March, A. D. 1890.

WM. NELSON, *Clerk*,
By —— ——, *Deputy*.

Received this summons at 2 p. m., March 17, 1890, and I certify to having served said summons by leaving a copy thereof with J. W. Williams, the agent of the within-named defendants at Muscogee, this 17th day of March, 1890.

T. B. NEEDLES, *Marshal*.

Indorsed: "No. 765. Ben. F. Lafayette *et al. vs.* Geo. A. Eddy *et al.* Summons. Summons issued 3, 17, 1890, returnable April term, 1890. Returned and filed Mar. 24, 1890. Wm. Nelson, clerk. Service, $2.00. S., W. & Hutchings, attorney- for plaintiff-."

UNITED STATES OF AMERICA, *ss*:

United States Court, Indian Territory, First Judicial Division.

At a stated term of the United States court, in the Indian Territory, begun and had in the court-rooms at Muscogee, in the Indian Territory, on the 7th day of April, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth.

Present: The Hon. James M. Shackelford, judge of said court.

On Tuesday, the 8th day of April, 1890, among the proceedings had were the following, to wit:

4 SALLIE M. HAILEY and BEN. F. LAFAYETTE
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway. } 765.

Now comes George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, and enter a special appearance for the purpose of a motion to quash the return of the marshal and the writ of summons herein.

Said motion to quash is in words and figures as follows, to wit:

"In the United States Court for the Indian Territory, April Term, A. D. 1890.

SALLIE M. HAILEY and BEN. F. LAFAYETTE, Plaintiffs,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway, a Corporation, Defendants. } No. 765.

Now come Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, who are in the complaint in this cause styled 'Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, a corporation,' and appearing specially and only for the purpose of this motion and for no other purpose, move the court to quash the return of the marshal on the writ of summons in this cause for the following reasons:

First. Because on the day alleged in said return as the day of service of said summons, to wit, on the 17th day of March, A. D. 1890, J. W. Williams, styled in the marshal's return on said writ of summons as the 'agent of the within-named defendants,' was not such agent.

Second. Because said J. W. Williams, on said 17th day of March, A. D. 1890, was not such a person upon whom process against said George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, could legally have been served.

Third. Because said return is untrue.

Fourth. Because said service and said return were illegally and improperly made.

C. L. JACKSON,
Attorney for George A. Eddy and H. C. Cross, Receivers of the Missouri, Kansas and Texas Railway."

Indorsed: "No. 765. U. S. court for the Indian Territory. Sallie M. Hailey and Ben. F. Lafayette, plaintiffs, *vs.* Geo. A.
5 Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, defendants. Motion of Geo. A. Eddy and H.

C. Cross, receivers of the Missouri, Kansas and Texas Railway Company, to quash the return of the marshal on the writ of summons. Filed April 8, 1890. Wm. Nelson, clerk. Clifford L. Jackson, attorney for Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway."

And further, on May 6th, 1890, being the 22d day of the said April term, 1890, the following proceedings were had in said case, to wit:

SALLIE M. HAILEY and BEN. F. LAFAYETTE
vs.
GEORGE A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway.

Now, at this day, come the defendants, appearing specially, and withdraw the motion heretofore filed herein by them to quash the return of the writ of summons, and, again appearing specially and only for the purposes of a motion to quash writ of summons and return thereon, now, by leave of the court first obtained therefor, file such motion, and in support of said last motion file affidavit of J. W. Williams and certified copy of order appointing receiver, and plaintiff being present, and said motion to quash writ of summons and return of marshal thereon now coming on to be heard, and the court, having seen and heard the same and being fully advised in the premises, doth overrule said motion, to which action of the court in so overruling said motion defendants at the time then and there duly excepted.

Said motion to quash the writ of summons and the return of the marshal thereon is in words and figures as follows, to wit:

In the United States Court for the Indian Territory, April Term, A. D. 1890.

SALLIE M. HAILEY and BEN. F. LAFAYETTE, Plaintiffs,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway, a Corporation, Defendants. } No. 765.

Now come Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, who are in the complaint in this cause styled "Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, a corporation," and, appearing specially and only for the purposes of this motion and for no other purpose, move the court to quash the writ of summons issued in this cause on the 17th of March, 1890, and also to quash the return of the marshal on said writ of summons, for the following reasons:

6 1. Because said writ of summons is improperly and illegally issued.

2. Because the writ of summons in this cause does not show the nature of the complaint filed herein.

3. Because no cause of action is set forth in the writ of summons issued herein.

4. Because said return on said writ is untrue.

5. Because said J. W. Williams, who is designated in said return as "the agent of Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, a corporation," was not on the day alleged in said return as the day of the service of said summons, to wit, said 17th day of March, A. D. 1890, such agent.

6. Because said J. W. Williams was not on said 17th day of March, 1890, such a person upon whom process against Geo. A. A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, could legally have been served.

7. Because said return and said service were illegally and improperly made.

C. L. JACKSON,
Attorney for the Missouri, Kansas & Texas Railway Company.

Indorsed: "No. 765. United States court for the Indian Territory. Sallie M. Hailey and Ben. F. Lafayette, plaintiffs, *vs.* Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas & Texas railway, defendants. Motion of Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas & Texas railway, to quash the return of the marshal on the writ of summons and the said writ. Filed May 6th, 1890. Wm. Nelson, clerk. Clifford L. Jackson, attorney for Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas & Texas railway."

And said affidavit of J. W. Williams filed in support of said motion is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *Indian Territory*, } *ss.:*

In the United States Court for the Indian Territory, April Term, A. D. 1890.

SALLIE M. HAILEY and BEN. F. LAFAYETTE, Plaintiffs,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas & Texas Railway, a Corporation, Defendants.

J. W. Williams, of lawful age, first being duly sworn, upon his oath states that at no time has he ever been the agent of the Missouri, Kansas & Texas railway, a corporation within the Indian Territory, and especially was he not such agent on the 17th
7 of March, 1890; that since the month of June, 1887, this affiant has been station agent for Geo. A. Eddy and Harrison C. Cross, receivers of the Missouri, Kansas & Texas Railway Company, and that this affiant since last-mentioned day to the present time has been such agent of said receivers at said town of Muscogee, in the Indian Territory.

J. W. WILLIAMS.

Subscribed and sworn to before me this 6th day of May, 1890.

WM. NELSON,
Clerk of the United States Court for the Indian Territory.
By W. R. SHACKELFORD, *Deputy.*

Indorsed: "No. 765. United States court of Indian Territory. Sallie Hailey and Ben. F. Lafayette *vs.* Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas & Texas railway, a corporation. Affidavit of J. W. Williams. Filed May 6th, 1890. Wm. Nelson, clerk."

And said certified copy of the order appointing receivers is in words and figures as follows, to wit: (Not on file with papers.)

And further, on May 19th, 1890, the same being the 33d day of said April term, the following proceedings were had in said case:

BEN. F. LAFAYETTE *et al.*
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas & Texas Railway Company.

Motion to Quash Depositions.

On this day come the defendants by their attorneys and file their motion to quash the depositions herein.

Said motion is in words and figures as follows, to wit:

United States Court for the Indian Territory, April Term, 1890.

BEN. F. LAFAYETTE and SALLY M. HAILEY
vs.
GEORGE A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway. } No. 765.

Now come the defendants and still protesting that they have not been properly served with process or writ of summons in this cause, and still saving to themselves all exceptions upon the ruling of the court heretofore had in this cause, and in no way waiving the question of said defective service and still asserting that this court has not properly acquired jurisdiction over them in this cause,

8 do move the court to quash the depositions of all witnesses certified to have been taken before Joseph French, notary public, on the 2d day of April, 1890, in the city of Pierce City, in the county of Lawrence and State of Missouri, on behalf of plaintiffs; for reasons for said motion defendant- state:

1st. That no reasonable notice of the taking of said depositions was ever given defendants as required by law.

2d. That such notice as was attempted to be given to take such depositions was not legally served.

3d. That such notice was too indefinite and uncertain to inform defendants as to place where depositions were to be taken.

4th. That the certificate of the officer before whom said depositions were taken shows that said depositions were taken at a different place than either of the places named in the said notice.

C. L. JACKSON,
Attorney for Defendants.

Indorsed: "No. 765. United States court for Indian Territory. Ben. F. Lafayette and Sally M. Hailey *vs.* George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway. Motion to quash depositions of plaintiff. Filed May 19, 1890. Wm. Nelson, clerk. Clifford L. Jackson, attorney for defendants."

Said depositions, together with the notice to take depositions, service of notice, certificate of officer before whom they were taken, attached thereto, and all indorsements thereon, are in words and figures as follows, to wit:

"NOTE.—The notice, caption and depositions of W. S. Johnson *et al.* omitted per stipulation of parties."

Afterwards, to wit, on the same judicial day of said term of said court, the same being the 19th day of May, A. D. 1890, the following further proceedings were had in said cause and entered of record, to wit:

BEN. F. LAFAYETTE *et al.*
vs.
GEO. A. EDDY *et al.*, Receivers, etc. } 765.

On this day come the defendants by their attorney and file their answer herein.

9 Said answer is in words and figures as follows, to wit:

"United States Court for the Indian Territory, April Term, 1890.

SALLY M. HAILEY and BEN. F. LAFAYETTE
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway. } No. 748.

Answer of Defendants.

Now comes the said defendants, Geo. A. Eddy and Harrison C. Cross, receivers of the Missouri, Kansas and Texas railway, and first still most respectfully protesting that they have not been properly served with process or writ of summons in this cause, and still saving to themselves all exceptions upon the ruling of the court heretofore had in this case upon defendants' motion to quash the writ of summons and return of marshal thereon in this cause, and in no way waiving the question of said defective service and writ of summons, and still most respectfully asserting that this court

has not properly acquired jurisdiction over them in this cause; for answer to plaintiffs' complaint herein, do say:

1. That defendants have no knowledge or information sufficient to form a belief as to whether or not said Ben. F. Lafayette is a white person and residing in the Indian Territory, or as to whether said plaintiff Sally M. Hailey is an Indian and residing in the Indian Territory, and therefore deny that such is the fact. Defendants further deny that they were at the time mentioned in plaintiffs' complaint, or are now the receivers of the Missouri, Kansas and Texas railway, a duly incorporated railway company doing business in the Indian Territory, and operating its railroad through the Indian Territory under and by virtue of the laws of the United States; defendants admit that they were duly and legally appointed receivers of the Missouri, Kansas and Texas railway, and were such receivers at the time of the institution of this action and at the times mentioned in said complaint, and were as such receivers in charge and possession of and operating that part of the Missouri, Kansas and Texas railway situated in the Indian Territory. Defendants state that they have no knowledge or information sufficient to form a belief as to whether or not the said Missouri, Kansas and Texas railway is located near the premises of said Sally Hailey in the Indian Territory, and therefore they deny that such is the fact. Defendants admit that the right of way of said Missouri, Kansas and Texas railway extends one hundred feet from the center of its track on either side thereof through the Indian Territory, except at certain stations in said Indian Territory.

Defendants deny that on the 30th day of August, 1889, that said defendants, contrary to their duty in that regard, carelessly and negligently omitted to keep said right of way clear and free of dry combustible material; and defendants deny that they negligently permitted large quantities of dry grass and weeds to accumulate over and upon said track and right of way, near the premises of the plaintiff.

Defendants deny that on said 20th day of August, 1889, an engine known as engine No. 63 was being operated and being run over the said Missouri, Kansas and Texas railway in the Indian Territory. Defendants deny that said engine No. 63 was of unskillful and defective construction, and deny that said engine was not supplied with the best appliances and contrivances for arresting sparks and preventing the emission of coals of fire from its smoke-stack. And defendants deny that on said 30th day of August, 1889, the servants, agents and employés of said defendants in operating and running said engine over said line of road near the premises of plaintiff, Sally M. Hailey, in said Indian Territory, negligently and carelessly permitted said engine to cast out sparks and coals of fire therefrom into the dry grass and other combustible material on defendants' right of way and set fire thereto, which spread onto the land of the plaintiff, the fire being continuous. Defendants state that they have no knowledge or information sufficient to form a belief as to whether said plaintiffs, Sally M. Hailey

and Ben. F. Lafayette, were jointly putting up, curing, etc., or had cut, cured and put large quantities of hay for sale, in the proceeds and profits of which sale said plaintiffs were to share in certain proportions, and therefore deny that such is the fact.

Defendants deny that said fire caught as aforesaid on defendants' right of way and spread rapidly on the premises of plaintiff, Hailey, and to the hay of said plaintiffs and burnt up and destroyed 666½ tons of hay, the property of said plaintiffs, to the value of $4.00 per ton, without any fault or negligence on the part of plaintiffs, to their damage in the sum of $2,666.00.

Defendants further state that they have no knowledge or information sufficient to form a belief as to what hay, if any, plaintiffs lost by fire, and plaintiffs used every endeavor and employed such assistance as they could to stop and put out said fire, to plaintiffs' damage in the sum of $19.50; therefore defendants deny that such is the fact.

Wherefore, defendants having fully answered plaintiffs' complaint, and every particular and allegation thereof, ask that
11 they may go hence without day and recover of plaintiffs their cost in this behalf laid out and expended.

C. L. JACKSON,
Attorney for Defendants.

Indorsed: "No. 765. United States court for Indian Territory. Sally M. Hailey and Ben. F. Lafayette *vs.* Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway. Answer of defendants. Filed May 19, 1890. Wm. Nelson, clerk. Clifford L. Jackson, attorney for defendants."

And further, on the 24th day of May, A. D. 1890, the same being the thirty-eighth day of said April term of said court, the following proceedings were had:

BEN. F. LAFAYETTE *et al.*
vs.
GEO. A. EDDY *et al.*

Motion to Suppress Depositions.

On this day come the parties by their respective attorneys, and the motion heretofore filed to suppress depositions herein coming on to be heard, the court, after hearing the argument of counsel, and being sufficiently advised in the premises, doth overrule the same.

And further, on the 26th day of May, 1890, the same being the thirty-ninth day of said April term of said court, the following proceedings were had, to wit:

SALLIE M. HAILEY and BEN. F. LAFAYETTE
vs.
GEORGE A. EDDY and HARRISON C. CROSS, Receivers of the Missouri, Kansas and Texas Railway. } 765.

Now come the parties to this cause, by their respective attorneys, and the motion heretofore filed herein to quash and suppress the depositions of all witnesses certified to have been taken before Joseph French, notary public, on the 2d day of April, 1890, in the city of Pierce City, in the county of Lawrence, State of Missouri, on behalf of plaintiff-, being now by the court taken up, the notice to take such depositions and the caption to said depositions and the certificate to said depositions of the officer purporting to have taken said depositions, and having heard the argument of counsel upon said motion and being fully advised in the premises, doth overrule said motion; to which action of the court in so overruling said motion, defendants do now at the time duly except.

12 And further, on June 5th, 1890, the same being the 46th day of said April term, 1890, the following further proceedings were had, to wit:

BEN. F. LAFAYETTE *et al.*
vs.
GEO. A. EDDY *et al.* } 765.

Now come the parties hereto and the motion to require plaintiff to verify his complaint being now taken up and seen and heard is by the court sustained.

Afterwards, to wit, on the 71st judicial day of said term of said court, the same being the 30th day of June, A. D. 1890, the further following proceedings were had in said cause and entered of record:

BEN. F. LAFAYETTE *et al.*
vs.
GEO. A. EDDY *et al.* } 765.

On this day come the defendants, Geo. A. Eddy and Harrison C. Cross, receivers of the Missouri, Kansas and Texas railway, by their attorney, and by leave of the court first had and obtained present and tender their bill of exceptions on their motion to quash the writ of summons and the return of the marshal thereon in this cause and pray the court that the same be allowed, signed and sealed and made a part of the record in this cause, which is now accordingly done.

Said bill of exceptions on motion to quash the writ of summons and the return of the marshal thereon is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *Indian Territory,* } ss:

In the United States Court for the Indian Territory, April Term, A. D. 1891.

SALLIE M. HAILEY and BEN. F. LAFAYETTE *against* GEO. A. EDDY and HARRISON C. CROSS, Receivers of the Missouri, Kansas and Texas Railway. } No. 765.

Be it remembered that at the regular April, 1890, term of the United States court for the Indian Territory begun and held on the 7th day of April, A. D. 1890, at the court-house, in the town of Muscogee, in the Indian Territory, the following, among other, proceedings were had in the above-entitled cause, to wit:

On the 6th day of May, A. D. 1890, defendants appearing, especially filed a motion to quash the writ of summons issued in this cause on the 17th day of March, 1890, and also to quash the return of the marshal on said writ of summons; which said motion is in words and figures as follows, to wit:

13 In the United States Court for the Indian Territory, April Term, A. D. 1890.

SALLIE M. HAILEY and BEN. F. LAFAYETTE, Plaintiffs, *vs.* GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway, a Corporation, Defendants. } No. 765.

Now comes Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, who are in the complaint in this cause styled "Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, a corporation," and appearing specially and only for the purposes of this motion and for no other purpose, move the court to quash the writ of summons issued in this cause on the 17th of March, 1890, and also to quash the return of the marshal on said writ of summons for the following reasons:

1. Because said writ of summons is improperly and illegally issued.

2. Because the writ of summons in this cause does not show the nature of the complaint filed herein.

3. Because no cause of action is set forth in the writ of summons issued herein.

4. Because said return on said writ is untrue.

5. Because said J. W. Williams, who is designated in said return as "the agent of Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, a corporation," was *was* not on the day alleged in said return as the day of the service of said summons, to wit, said 17th day of March, A. D. 1890, such agent.

6. Because said J. W. Williams was not on said 17th of March, 1890, such a person upon whom process against Geo. A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, could legally have been served.

7. Because said return and said service were illegally and improperly made.

C. L. JACKSON,
Attorney for the Missouri, Kansas and Texas Railway Company.

Indorsed: "No. 765. U. S. court for the Indian Ter. Sallie M. Hailey and Ben. F. Lafayette, plaintiffs, *vs.* Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, defendants. Motion of Geo. A. Eddy and H. C. Cross, receivers of
14 the Missouri, Kansas and Texas railway, to quash the return of the marshal on the writ of summons and the said writ. Filed May 6, 1890. Wm. Nelson, clerk. Clifford L. Jackson, attorney for Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway."

And said motion being then and there at the time taken up for hearing, and all parties being present by their respective attorneys, defendants now introduce testimony proving that said Geo. A. Eddy and Harrison C. Cross are receivers of the Missouri, Kansas and Texas railway, and were so duly and legally appointed by the United States circuit courts for the district of Kansas and western district of Arkansas prior to the institution of this cause, and were, as such receivers, engaged in operating said railway prior to and at the time of the institution of this suit and service of writ of summons herein on J. W. Williams, agent of said receivers, and also testimony proving that J. W. Williams, upon whom writ of summons in this cause was served on March 17th, 1890, was on such day station agent for such receivers at Muscogee, Indian Territory.

Defendants also introduced in evidence writ of summons in this cause, issued March 17th, A. D. 1890, and return of marshal thereon, which are in words and figures as follows:

UNITED STATES OF AMERICA, }
Indian Territory. }

The President of the United States of America to the marshal of the Indian Territory:

You are commanded to summons George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, a corporation, to answer on the 1st day of the next April term of the United States court for the Indian Territory, being the 7th day of April, A. D. 1890, a complaint filed against them in said court by Sallie M. Hailey and Ben. F. Lafayette, and warn them that upon their failure to answer the complaint will be taken for confessed, and you will make due return of the summons on the 1st day of the next April term of said court.

Witness the Honorable James M. Shackelford, judge of
[SEAL.] said court, and the seal thereof, at Muscogee, Indian Territory, this 17th day of March, A. D. 1890.

WM. NELSON, *Clerk*,
By —— ——, *Deputy*.

Received this summons at 2 p. m., March 17, 1890, and I certify to having served said summons, by leaving a copy thereof with J. W. Williams, the agent of the within-named defendants, at Muscogee, this 17th day of March, 1890.

T. B. NEEDLES, *Marshal*.

15 Indorsed: "No. 765. Ben. F. Lafayette *et al. vs.* Geo. A. Eddy *et al.* Summons. Summons issued 3-17, 1890, returnable April term, 1890. Returned and filed March 24, 1890. Wm. Nelson, clerk. Service, $2.00. S. W. & Hutchings, attorney for plaintiff."

And there was no other or further testimony offered by either party on said motion, and the court being fully advised in the premises overruled said motion, to which action of the court in overruling said motion, defendants at the time then and there duly excepted, and at which time the court made the following entry of record, to wit:

"SALLIE M. HAILEY and BEN. F. LAFAYETTE
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway. } No. 765.

Now at this day come the defendants, appearing specially, and withdraw their motion heretofore filed herein by them to quash the return on the writ of summons, and again appearing specially and only for the purposes of a motion to quash writ of summons and return thereon, now, by leave of the court first obtained therefor, file such motion, and in support of said last motion, file affidavit of J. W. Williams and certified copy of order appointing receivers, and plaintiff being present, and said motion to quash writ of summons and return of marshal thereon now coming on to be heard, and the court having seen and heard the same and being fully advised in the premises, doth overrule said motion, to which action of the court in so overruling said motion, defendants at the time then and there duly excepted."

And now come said defendants in open court at the present April term, A. D. 1890, and present and tender this their bill of exceptions and pray the court that the same be allowed, signed and sealed and made a part of the record in this cause, which is now accordingly done.

In witness whereof, I, the undersigned judge of the United States court for the Indian Territory, have this 30th day of June, A. D.

1890, set my hand and affix my seal in open court during the April (1890) term of said court.

[SEAL.] JAMES M. SHACKELFORD,
Judge of the United States Court for the Indian Territory."

Indorsed: "765. U. S. court for the Indian Territory. Sallie M. Hailey and Ben. F. Lafayette *vs.* Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway. Bill of exceptions on motion to quash writ of summons and return. Filed June 30th, 1890. Wm. Nelson, clerk."

16 Afterwards, to wit, on the same judicial day of said term of said court, the same being the 30th day of June, A. D. 1890, the following further proceedings were had in said cause and entered of record, to wit:

SALLIE M. HAILEY and BEN. F. LAFAYETTE
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway. } 765.

Now come the defendants by their attorney, and by leave of the court first had and obtained, file herein their bill of exceptions on motion to quash depositions.

Said bill of exceptions on motion to quash depositions is in words and figures as follows, to wit:

"UNITED STATES OF AMERICA, } *ss.:*
Indian Territory, }

In the United States Court for the Indian Territory, April Term, A. D. 1890.

SALLIE M. HAILEY and BEN. F. LAFAYETTE
against
GEO. A. EDDY and HARRISON C. CROSS, Receivers of the Missouri, Kansas and Texas Railway. } No. 765.

Be it remembered that the following, among other, proceedings were had in the above-entitled cause in the United States court for the Indian Territory, at the regular April, 1890, term, begun and holden on the seventh day of April, A. D. 1890, at the court-house in the town of Muscogee, Indian Territory, to wit:

On the eighth day of April, defendants appeared for the first time in said cause and appeared specially for the purpose of filing a motion to quash the return of the United States marshal on the writ of summons in this cause, at which time the court made the following record entry, which said entry is in words and figures as follows, to wit:

"SALLIE M. HAILEY and BEN. F. LAFAYETTE
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway. } 765.

Now comes Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, and enters a special appearance for the purpose of a motion to quash the return of the marshal and the writ of summons herein."

Defendants next appeared on May 6th, 1890, and entered special appearance only for purpose of withdrawing motion to quash
17 return filed April 8th, 1890, and of filing motion to quash writ of summons and return of U. S. marshal on said writ of summons, at which said time following entry is made of record, to wit:

"SALLIE M. HAILEY and BEN. F. LAFAYETTE
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway. } No. 765.

Now, at this day come the defendants, appearing specially and withdraw their motion heretofore filed herein by them to quash the return on the writ of summons, and again appearing specially and only for the purposes of a motion to quash writ of summons and return thereon, now by leave of the court first obtained therefor, file such motion, and in support of said last motion, file affidavit of J. W. Williams and certified copy of order appointing receivers, and plaintiff being present, and said motion to quash writ of summons and return of marshal thereon now coming on to be heard, and the court having seen and heard the same and being fully advised in the premises, doth overrule said motion, to which action of the court in so overruling said motion, defendants at the time then and there duly excepted."

And May 19th, A. D. 1890, defendants next appeared and filed a motion to quash depositions of all witnesses certified to have been taken before Joseph French, notary public, on the 2d day of April, 1890, in the city of Pierce City, in the county of Lawrence and State of Missouri, on behalf of plaintiffs, which said motion is in words and figures as follows: (Here copy said motion.)

United States Court for the Indian Territory, April Term, 1890.

BEN. F. LAFAYETTE and SALLY M. HAILEY
vs.
GEORGE A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway. } No. 765.

Now come the defendants, and still protesting that they have not been properly served with process or writ of summons in this cause, and still saving to themselves all exceptions upon the ruling of the

court heretofore had in this cause, and in no way waiving the question of said defective service, and still asserting that this court has not properly acquired jurisdiction over them in this cause, do move the court to quash the depositions of all witnesses certified to have been taken before Joseph French, notary public, on the 2d day of
April, 1890, in the city of Pierce City, in the county of Law-
18 rence and State of Missouri, on behalf of plaintiffs. For reasons for said motion defendants state:

1st. That no reasonable notice of the taking of said depositions was ever given defendants as required by law.

2d. That such notice as was attempted to be given to take such depositions was not legally served.

3d. That such notice was too indefinite and uncertain to inform defendants as to place where depositions were to be taken.

4th. That the certificate of the officer before whom said depositions were taken shows that said depositions were taken at a different place than either of the places named in the said notice.

C. L. JACKSON,
Attorney for Defendants.

Indorsed: "No. 765. U. S. court for Indian Territory. Ben. F. Lafayette and Sally M. Hailey *vs.* George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway. Motion to quash depositions of plaintiff. Filed May 19, 1890. Wm. Nelson, clerk. Clifford L. Jackson, attorney for def'ts."

And said motion being on the 26th day of May, A. D. 1890, taken up and heard by the court, and all parties being present by respective counsel, and the defendants having, in support of said motion, introduced in evidence proceedings of this court in this cause, as shown in two above-mentioned record entries, and also notice of the proposed taking of said depositions, said notice being filed in this court March 27th, 1890, and is in words and figures as follows:

"In the United States Court for the Indian Territory.

SALLIE M. HAILEY and BEN. F. LAFAYETTE, Plaintiffs,
against
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway, Defendants.

Notice to Take Depositions.

To the above-named defendants:

You are hereby notified that depositions of witnesses, to be read in evidence in the above-entitled cause on the part of the plaintiffs, will be taken at the office of Joseph French, or in the town of Pierce City, in the State of Missouri, on the 2d day of April, 1890, between the hours of eight o'clock in the forenoon and six o'clock

in the afternoon of that day, and that the taking of said
19 depositions, if not completed on that day, will be continued from day to day, at the same place and between the same hours, until completed.

SALLIE HAILEY AND
BEN. F. LAFAYETTE,
By SANDELS, WARNER & HUTCHINGS,
Their Att'ys."

And also return of United States marshal on said notice, being dated March 27, A. D. 1890, in words and figures as follows: "I certify to having handed C. L. Jackson, attorney for the above-named defendants, a copy of this notice this 27th day of March, 1890, at 1:25 p. m.

T. B. NEEDLES, *Marshal*,
By F. S. GENUNG, *Deputy*."

And also caption to said depositions, said depositions and certificate to said depositions of said Joseph French, notary public, dated April 2d, A. D. 1890, and also said depositions which purport to have been taken by said Joseph French, notary public, on said 2d day or April, A. D. 1890; which said caption, depositions and certificate thereto are in words and figures as follows (here copy said caption, depositions and certificate):

Caption.

"Deposition of witnesses to be read in a cause wherein Sallie M. Hailey and Ben. F. Lafayette are plaintiffs and H. C. Cross and George A. Eddy, receivers of M., K. & T., are defendants, pending in the United States court for the Indian Territory, holden at Muscogee, I. T. No. 765."

Depositions.

Depositions of W. S. Johnson, Henry White, French Godley, C. C Keesee, P. P. Lehnherd, J. P. Linzee and John Manlove, taken on the 2d day of April, 1890, between the hours of eight o'clock a. m. and six o'clock p. m., at the office of Joseph French, in the city of Pierce City, in the county of Lawrence and State of Missouri, to be read in evidence in an action between Sallie M. Hailey and Ben. F. Lafayette, plaintiffs, and George A. Eddy and H. C. Cross, receivers of Missouri, Kansas and Texas Railway Company, defendants, pending in the United States court for the Indian Territory.

NOTE.—The testimony of W. S. Johnson *et al.* omitted, per stipulation of parties."

STATE OF MISSOURI, }
County of Lawrence, } ss:

I, Joseph French, a notary public within and for Lawrence county, in the State of Missouri, do certifiy that the foregoing
20 deposition of W. S. Johnston, French Godley, Henry White, C. C. Keesee, P. J. Lehnhard, I. P. Linzee and John

Manlove was taken before me and was read to and subscribed by them in my presence, at the time and place and in the action mentioned in the caption, the said W. S. Johnston, French Godley, Henry White, C. C. Keesee, P. J. Lehnhard, I. B. Linzee and John Manlove, having been first sworn by me that the evidence that they should give in the action should be the truth, the whole truth, and nothing but the truth, and that their statements were reduced to writing by me in their presence. The plaintiff, Ben. F. Lafayette, being present in person and by attorney at the examination; neither of the defendants were present in person or by attorney.

Given under my hand this second day of April, 1890.

[SEAL.] JOSEPH FRENCH,
Notary Public.

My commission expires May 28, 1892.

Notaric's fees, $6.00, including postage, etc			$6 00
Witness	"	W. S. Johnston	50
"	"	Henry White	50
"	"	French Godley	50
"	"	P. J. Lehnhard	50
"	"	C. C. Keesee	50
"	"	I. P. Linzee	50
"	"	John Manlove	50
Constable fees and mileage subpœnaing witnesses			2 50
			$12 00

Above fees paid by plaintiff, Ben. F. Lafayette.

JOS. FRENCH,
Notary Public.

STATE OF MISSOURI, } ss:
County of Lawrence, }

I hereby certify that Joseph French, before whom the foregoing deposition was made, and who has hereunto subscribed his name, was at the time of so doing a notary public in and for the county aforesaid, duly commissioned and sworn, and that his signature thereto is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of my office, as clerk of the county court for the county aforesaid, this 4th day of April, 1890.

[SEAL.] JOHN A. COCHRAN,
County Clerk."

21 Indorsement: "Depositions of witnesses to be read in a cause wherein Sallie M. Hailey and Ben. F. Lafayette, plaintiffs, and H. C. Cross and George A. Eddy, receivers of the M., K. & T., are defendants, pending in the United States court for the Indian Territory, holden at Muscogee, I. T. No. 765. Filed April 6, 1890. Published April 8, 1890, at request of plaintiffs' attorney. Wm. Nelson, clerk, by W. R. Shackelford, deputy."

And the court having seen and heard said evidence, and there being no other or further evidence or testimony offered by either party, either in support of or against said motion, and the court being fully advised in the premises, overrules said motion; to which action of the court in so overruling said motion, defendants then and there at the time duly excepted, and at which said time the court made the following entry of record, to wit:

"BEN. F. LAFAYETTE *et al.*
vs.
GEO. A. EDDY *et al.*

Motion to Suppress Depositions.

On this day comes the parties by their respective attorneys and the motion heretofore filed to suppress depositions herein coming on to be heard, the court after hearing the argument of counsel, and being sufficiently advised in the premises, doth overrule the same."

And now comes said defendants in open court at this present April, A. D. 1890, term of this court and present and tender this their bill of exceptions and pray the court that the same be allowed, signed and sealed and made a part of the record in this cause, which is now accordingly so done.

In witness whereof I, the undersigned judge of the United States court for the Indian Territory, have this 30th day of June, A. D. 1890, set my hand and affixed my seal in open court during the April, A. D. 1890, term of said court.

[SEAL.] JAMES M. SHACKELFORD,
Judge of the United States Court for the Indian Territory.

Indorsed: "765. U. S. court for the Indian Territory. Sallie M. Hailey and Ben. F. Lafayette *vs.* Geo. A. Eddy and Harrison C. Cross, receivers of the Missouri, Kansas and Texas railway. Bill of exceptions on motion to quash depositions. Filed June 30th, 1890. Wm. Nelson, clerk."

22 UNITED STATES OF AMERICA, *ss:*

United States Court, Indian Territory, First Judicial Division.

At a stated term of the United States court in the Indian Territory, first judicial division, begun and had in the court-rooms at Muscogee, in the Indian Territory, on the 12th day of November in the year of our Lord one thousand eight hundred and ninety and of the Independence of the United States of America the one hundred and fifteenth.

Present, the Hon. James M. Shackelford, judge of said court.

On Wednesday, the 13th day of November, 1890, among the proceedings had were the following, to wit:

Motion to Make Complaint More Definite.

BEN. F. LAFAYETTE and SALLIE HAILEY
vs.
G. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway. } 765.

Now on this day come the defendants by their attorney and file their motion to have the plaintiffs herein make their complaint more specific.

Said motion to make complaint more definite is in words and figures as follows, to wit:

"In the United States Court for the Indian Territory, First Judicial Division, November Term, A. D. 1890.

BEN. F. LAFAYETTE and SALLIE HAILEY, Plaintiffs,
against
GEORGE A. EDDY and HARRISON C. CROSS, Receivers of the Missouri, Kansas and Texas Railway.

Now come the defendants and still protesting that they have not been properly served with process or writ of summons in this cause and still saving to themselves all exceptions upon the ruling of the court heretofore in this cause on defendants' motion to quash the writ of summons and return thereon, and in no way waiving the question of said defective service of the writ of summons and return and still most respectfully asserting that this court has not properly acquired jurisdiction over them in this cause, do move the court:

First. To require the plaintiffs to make their complaint more specific, definite and certain.

23 Second. To require plaintiffs to set out in said complaint fully, specifically and definitely, the character of the arrangement or contract under which plaintiffs were to put up hay as alleged in said complaint, and just how and in what manner said plaintiffs were to share in the proceeds and profits of the sale of such hay as they might have put up as alleged in said complaint.

CLIFFORD L. JACKSON,
Attorney for Defendants.

Indorsed: "765. The United States court for the Indian Territory, first judicial division, November term, 1890. Ben. F. Lafayette and Sallie Hailey, against G. A. Eddy and H. C. Cross, receivers of the M., K. & T. R. W. Motion to make complaint more definite, etc. C. L. Jackson, att'y for defendants, Muscogee, Ind. Terr'y. Filed Nov. 13, 1890. Wm. Nelson, clerk."

Afterwards, to wit, on the same judicial day of said term of said court, the same being the 13th day of November, A. D. 1890, the following further proceedings were had in said cause and entered of record.

Withdrawal of Answer.

BEN. F. LAFAYETTE and SALLIE HAILEY
against
G. A. EDDY and H. C. CROSS, Receivers of Missouri, Kansas and Texas Railway.

Now on this day come the defendants and withdraw their answer heretofore filed herein.

THE UNITED STATES OF AMERICA, *ss:*

United States Court, Indian Territory, First Judicial Division.

At a stated term of the United States court, in the Indian Territory, first judicial division, begun and had in the court-rooms, at Muscogee, in the Indian Territory, on the 12th day of May in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States of America the one hundred and fifteenth.

Present, the Hon. James M. Shackelford, judge of said court.

On Thursday, the fourth day of June, 1891, among the proceedings had were the following, to wit:

BEN. F. LAFAYETTE *et al.*
vs. } 765.
GEO. A. EDDY *et al.*, Rec'rs M. K. & T. R'y.

This day came on to be heard defendants' motion to require plaintiffs to make their complaint more specific, and the same
24 being duly considered by the court, is overruled. To which ruling of the court defendants at the time duly excepted.

And further, on Wednesday, June 24th, 1891, the same being the 35th day of said May term, the following among other proceedings were had, to wit:

Answer Filed.

BEN. F. LAFAYETTE *et al.*
vs. } 765.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway.

Now come the defendants by their attorney, and by leave of the court first had and obtained, file herein their answer heretofore withdrawn.

And further, on Thursday, June 25th, 1891, the same being the 36th day of said May term, the following proceedings were had in said cause, to wit:

BEN. F. LAFAYETTE *et al.*
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway. } 765.

This day came on to be heard the above cause, and the parties appeared and announced ready for trial. Thereupon came a jury of good and lawful men, to wit, M. L. Shafer, Wm. Elliott, D. E. Davis, Louis Fulsom, J. L. Kinesley, Tom Berthoff, Houston Smith, John Shinn, L. D. Fuller, A. D. Orcutt, J. D. Harris and C. D. Strange, who were duly empaneled and sworn, and the trial of said cause begun. The time for adjournment having arrived, the jury are allowed to separate until tomorrow morning at 9 o'clock, under the usual instructions of the court.

And further, on Friday, June 26th, 1891, the same being the thirty-seventh day of said May term, the following proceedings were had in said cause, to wit:

BEN. F. LAFAYETTE *et al.*
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway. } 765.

This day the trial of this cause was proceeded with before the jury. Thereupon defendants move to have all the plaintiffs' evidence stricken out. Also file affidavits of C. L. Jackson and Wm. Brehm for a continuance. Defendants then ask leave to amend affidavit, which is granted. Thereupon the jury, under the usual instructions of the court, were excused until tomorrow morning at 9 o'clock.

25 Said motion to strike out evidence of plaintiffs, affidavit of Clifford L. Jackson, and affidavit of Wm. H. Brehm are in words and figures respectively as follows, to wit:

"In the United States Court in the Indian Territory, First Judicial Division, May Term, A. D. 1891.

BEN. F. LAFAYETTE and SALLY M. HAILEY, Plaintiffs,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway, Defendants.

Motion to Strike Out Testimony of Plaintiff.

Now at this day come the above-named defendants in the above-entitled cause, and move this honorable court to withdraw from the jury all evidence in this case offered by the plaintiffs and now before the jury, and for grounds of said motion say:

First. That there is a material variance between the said proof and the allegations in the plaintiffs' complaint in this, that said complaint alleges that said engine No. 63, mentioned in said com-

plaint, set out the fire complained of in plaintiffs' complaint, and occasioned the damage for which plaintiffs now sue, whereas the evidence in this case does not show that said engine No. 63, mentioned in plaintiffs' complaint, was the engine which set out the fire that occasioned the damage of which plaintiffs in their complaint complain. And that because of such variance between plaintiffs' complaint and plaintiffs' evidence in this cause these defendants are greatly misled and surprised and are unable to meet the state of facts made by plaintiffs' proof in this case, but respectfully show to the court that they are able to meet the state of facts made by plaintiffs' complaint, and are prepared at this time to go on with said trial if plaintiffs be required to prove the facts as alleged in their said complaint.

Second. That plaintiffs have wholly failed to prove the allegation in their complaint contained in this, that they have not shown that engine No. 63 was the engine that set out the fire complained of as having occasioned the destruction of plaintiffs' hay.

And in support of this said motion defendants now file affidavits of Clifford L. Jackson, their attorney in this case, and of William H. Brehm, one of their witnesses in this case.

CLIFFORD L. JACKSON,
Attorney for Defendants."

Indorsed: "No. 765. Ben. F. Lafayette and Sally M. Hailey *vs.* Geo. A. Eddy and H. C. Cross, receivers Missouri, Kansas & Texas railway. Motion to strike out evidence of plaintiff. Filed June 26th, 1891. Wm. Nelson, clerk. C. L. Jackson, attorney for defendants."

26 *Affidavit of C. L. Jackson.*

UNITED STATES OF AMERICA:

Indian Territory, First Judicial Division.

In the United States Court in the Indian Territory, First Judicial Division, May Term, 1891.

BEN. F. LAFAYETTE and SALLIE M. HAILEY, Complainants,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas & Texas Railway, Defendants.

Clifford L. Jackson, of lawful age, first being duly sworn, upon his oath, states: That he is the attorney of record for the defendants in the above-entitled cause; that he has been the only attorney employed by said defendants to manage said cause from the time of the institution of this suit to the present time; that in preparing the defense in this case he relied upon the allegation in plaintiffs' complaint that the engine which set out the fire complained of was engine No. 63, belonging to and in possession of said receivers in their management and operation of the Missouri, Kansas & Texas

railway; that this affiant in the preparation of the defense for the above-named defendants in this cause made inquiries of the proper agents, servants and employés of the above-named defendants, and was informed and states that he is now able to show to this honorable court that said receivers on said 20th and 30th days of August, A. D. 1889, owned and possessed an engine, No. 63, as described in plaintiffs' complaint, and only one such engine bearing such number 63, and that such engine, No. 63, on the 30th day of August, A. D. 1889, was in the shops of said receivers at the town of Parsons, in the State of Kansas, undergoing repairs; that after the deposition of witnesses taken in this cause and read to the jury as a part of the plaintiffs' evidence in this cause were taken, this affiant made further inquiry of the proper agents, servants and employés of said receivers, and was informed and states now to the court that he is prepared to prove in this cause and at this time that such engine, No. 63, was in the shops at the town of Parsons, in the State of Kansas, on the said 20th day of August, A. D. 1889, undergoing repairs, and that on each of said days, to wit, the 20th day of August, and the 30th day of August, A. D. 1889, said engine, No. 63, described as aforesaid in plaintiffs' complaint as the engine which set out the fire that destroyed plaintiffs' hay, was in said machine shop at Parsons, Kansas, undergoing repairs as aforesaid, and was not within the Indian Territory upon either of said days; that this affiant was also informed from papers placed in his possession by the claim department of defendants' railway

27 that said plaintiffs relied upon the allegation made in their complaint that said engine No. 63 was the engine that set out such fire, and that said plaintiffs would so attempt to prove upon the trial of this cause, and that no other engine than said engine No. 63 did set out such fire; that this affiant now shows to the court that such information was given to said claim department by these plaintiffs for the purpose of identifying the particular engine that set out the fire in question, and believing it to be the law that said plaintiffs were required in good faith to set out in their complaint, as they have done, that said engine No. 63 was the engine that set out such fire; this affiant, as attorney for these defendants, relied upon the same, and has prepared the defense in this case in order to meet such allegations as to such particular engine, and is not prepared to defend this cause should the court permit these plaintiffs to prove that any other engine set out such fire, or to amend their complaint by alleging some other engine than said engine No. 63 set out such fire.

This affiant states to the court that he, as attorney for said defendants, and the only attorney in charge of their cause, and the defendants themselves, have been misled by the variance between the allegation in plaintiffs' complaint, that engine No. 63 set out the fire in question, and plaintiffs' proofs in this cause which does not show what engine, if any, set out the fire in question; that affiant, as such attorney, and the defendants in this cause, are surprised at such variance between plaintiffs' complaint and plaintiffs' proof in this cause, and state to the court that they cannot prepare at the

present term of this court to defend this cause against the proof of plaintiffs in this cause unless plaintiffs are required to prove, as part of their case, that said engine No. 63 did actually set out the fire in question.

CLIFFORD L. JACKSON.

Subscribed and sworn to before me this 26th day of June, A. D. 1891.

WM. NELSON, *Clerk*,
By W. R. SHACKELFORD, *Deputy*."

Indorsed: "No. 765. U. S. court in Indian Territory, first judicial division. Ben. F. Lafayette *et al. vs.* Geo. A. Eddy and Harrison C. Cross, as receivers of the M., K. & T. R'y. Affidavit of Clifford L. Jackson. Filed June 26, 1891. Wm. Nelson, clerk."

28 *Affidavit of William H. Brehm.*

"UNITED STATES OF AMERICA, *ss:*

Indian Territory, First Judicial Division.

In the United States Court in the Indian Territory, First Judicial Division, May Term, A. D. 1891.

BEN. F. LAFAYETTE and SALLY M. HAILEY, Plaintiffs,
vs.
GEO. A. EDDY and H. C. CROSS, as Receivers of the Missouri, Kansas and Texas R'y, Defendants.

Affidavit of Wm. H. Brehm.

William H. Brehm, of lawful age, first having been duly sworn, upon his oath states:

That he is now in attendance upon this honorable court as a witness for defendants in the above-entitled cause; that at the present time and during the entire month of August, A. D. 1889, and ever since last-mentioned month, this affiant has been in the employ of the above-named defendants as general foreman of the machine shops of said defendants at the town of Parsons, in the State of Kansas. This affiant can testify in this case and will, if called as a witness, testify in this case that on the 20th day of August, A. D. 1889, there was but one engine running between the towns of Parsons, Kansas, and Muscogee, Indian Territory, known as engine No. 63, and bearing said number, 63.

And that on said 20th day of August, A. D. 1889, said engine number 63 was in said machine shops at Parsons, Kansas, under charge and in custody of this affiant, undergoing repairs.

And that upon said 20th day of August, A. D. 1889, said engine was not within the Indian Territory. That this affiant has no information or knowledge as to what engine or engines ran over the M., K. & T. R'y between the town of Parsons, Kansas, and Mus-

cogee, Indian Territory, on the said 20th day of August, A. D. 1889. That it is not a part of the duty of this affiant as such general foreman as aforesaid, and it was not his duty upon the 20th day of August, A. D. 1889, to know or to learn what engines ran over the Missouri, Kansas and Texas railway between the towns of Parsons, Kansas, and Muscogee, Indian Territory, on the said 20th day of August, A. D. 1889.

WILLIAM H. BREHM.

Subscribed and sworn to before me this 26th day of June, A. D. 1891.

——— ———, *Clerk.*

29 Indorsed: "No. 765. U. S. court in Indian Territory, first judicial division. Ben. F. Lafayette *et al. vs.* Geo. A. Eddy and H. C. Cross, as receivers of the M., K. & T. R'y. Affidavit of Wm. H. Brehm. Filed June 26, 1890. Wm. Nelson, clerk."

And further, on Saturday, June 27th, 1891, the same being the 38th day of said court, the following proceedings were had in said cause, to wit:

BEN. F. LAFAYETTE *et al.*
vs. } 765.
RECEIVERS M., K. & T. R'Y.

This day came on for hearing defendants' motion to strike out all of plaintiffs' testimony to the jury, which motion was overruled by the court; to which defendants excepted. Whereupon plaintiffs moved the court to amend their complaint by striking out the words "No. 63," to which defendants objected. Said motion, having been considered by the court, was sustained; to which ruling defendants excepted. Plaintiffs thereupon amended their said complaint by striking out said words; to which defendants excepted upon plaintiffs so amending their said complaint. Thereupon defendants moved the court for a continuance, and filed affidavits in support of motion; which said motion having been considered by the court, is overruled; to which defendants excepted. Thereupon the trial of said cause *was* proceeded. Pending said trial, the hour for adjournment having arrived, the jury, under the instructions of the court, were permitted to separate until Monday morning, June 29th, 1891, at 9 o'clock.

And further, on Monday, June 29th, 1891, the same being the 39th day of said May term of said court, the following proceeding was had in said case, to wit:

BEN. F. LAFAYETTE *et al.*
vs. } 765.
GEO. A. EDDY and H. C. CROSS, Receivers M., K. & T. R. R.

This day the trial of this cause was resumed before the jury, and the evidence having been concluded and heard by the jury, and the jury also having heard the charge of the court and the argument of counsel, retired in charge of a sworn bailiff, to consider of their ver-

dict; and after due deliberation, returned into open court the following verdict: "Ben. F. Lafayette and Sallie M. Hailey, plaintiffs, *vs.* Geo. A. Eddy and Harrison C. Cross, receivers Missouri, Kansas and Texas railway. We, the jury duly empaneled and sworn in the above entitled and numbered cause, do find the issues in favor of the plaintiffs, and assess their damages at $2,664 (two thousand six hundred and sixty-four dollars). L. D. Fuller, M. D., foreman."

30 It is therefore considered, ordered, and adjudged by the court that plaintiffs, Ben. F. Lafayette and Sallie M. Hailey, do have and recover of and from the defendants, Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, said sum of twenty-six hundred and sixty-four $\frac{00}{100}$ dollars, with 6 per cent. interest thereon from date hereof until paid, and all costs of suit, for which let execution issue.

And further, on Friday, July 10th, 1891, the same being the 48th day of said May term, the following proceedings were had in said cause:

BEN. F. LAFAYETTE and SALLIE M. HAILEY
vs. } 765.
GEO. A. EDDY and H. C. CROSS, Rec'rs M., K. & T. R'y.

Now at this day come all the parties hereto, and defendants file their motion for a new trial in this cause, and the same being now taken up, seen and heard by the court, the court being fully advised in the said premises, doth overrule said motion, to which action of the court in so overruling said motion and in so refusing to grant a new trial in this cause, the defendants then and there at the time duly excepted.

Whereupon the plaintiffs move the court to render a judgment in this cause upon the verdict of the jury heretofore rendered herein, and thereupon defendants file written objections to the rendering and entering of the judgment in this cause upon said verdict, upon the grounds that the amount of damages assessed by the jury in this case is excessive, which objection is by the court overruled, and to which action of the court in so overruling such objections defendants then and there at the time duly excepted, and the court doth now grant the motion of plaintiffs for judgment, and doth order that judgment be rendered and entered in this cause in accordance with the verdict heretofore returned by the jury, to which action of the court in so ordering such judgment to be so rendered and entered in this cause defendants then and there at the time duly excepted.

Afterwards, to wit, on the same judicial day of said term of said court, the same being the 10th day of July, A. D. 1891, the following further proceedings were had in said cause and entered of record:

BEN. F. LAFAYETTE and SALLIE M. HAILEY
vs.
GEO. A. EDDY and H. C. CROSS, Rec'rs M., K. & T. R'y. } 765.

Now at this day, and in accordance with the motion of plaintiffs for judgment upon the verdict in this cause, as heretofore rendered herein, it is accordingly adjudged by the court that the plaintiffs recover of the defendants the sum of twenty-six hundred and sixty-four $^{0}/_{100}$ dollars, with interest on the same from date until paid at the rate of 6 per cent. per annum, also their costs herein expended.

31

The motion of defendants herein for a new trial, and their written objections to the entering of judgment on the verdict in this cause, are respect*fully* as follows, to wit:

"In the United States Court in the Indian Territory, First Judicial Division, May Term, A. D. 1891.

BEN. F. LAFAYETTE and SALLY M. HAILEY, Plaintiffs,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway, Defendants. } No. 765.

Motion for New Trial.

Now come the defendants in open court during the said May, A. D. 1891, term of said court, and move the court to grant a new trial in this cause for the following reasons, to wit:

1. Because the court erred in refusing to allow the challenge of defendants' counsel to one M. S. Lawson, one of the jurors called in this case after the defendants had exhausted their peremptory challenges; wherefore, the defendants were prevented from having a fair trial.

2. Because the court erred in permitting plaintiffs' counsel, against the objections of defendants' counsel, to introduce in evidence and read to the jury in this case the depositions of W. S. Johnson.

3. Because the court erred in permitting plaintiffs' counsel, against the objections of defendants' counsel, to introduce in evidence and read to the jury in this case, the deposition of French Godby.

4. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case, the deposition of Henry White.

5. Because the court erred in permitting plaintiffs' counsel, against the objections of defendants' counsel, to introduce in evidence and read to the jury in this case, the deposition of C. C. Keezee.

6. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evi-

dence and read to the jury in this case, the deposition of P. J. Lenhard.

32 7. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case, the deposition of J. P. Linzee.

8. The court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case, the deposition of John Manlove.

9. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case, the deposition of Peter Frazier.

10. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case, the deposition of John T. Abercrombie.

11. Because the court erred in permitting plaintiffs' counsel, against the objections of defendants' counsel, to introduce in evidence and read to the jury in this case, the deposition of George Wirth.

12. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury, the deposition of F. O. Voetter.

13. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case, the deposition of Ed. McKenna.

14. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case, the deposition of W. H. McMurry.

15. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness W. S. Johnson as were objected to by defendants' counsel.

16. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness French Godby as were objected to by defendants' counsel.

17. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness Henry White as were objected to by defendants' counsel.

33 18. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness C. C. Keezee as were objected to by defendants' counsel.

19. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the depo-

sition of witness P. J. Lenhard as were objected to by defendants' counsel.

20. Because the court erred in permitting plaintiffs' counsel to introduce and read in evidence to the jury such parts of the deposition of witness J. P. Linzee as were objected to by defendants' counsel.

21. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness John Manlove as were objected to by defendants' counsel.

22. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness Peter Frazier as were objected to by defendants' counsel.

23. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness John T. Abercrombie as were objected to by defendants' counsel.

24. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness George Wirth as were objected to by defendants' counsel.

25. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness F. O. Voetter as were objected to by defendants' counsel.

26. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness Ed. McKenna as were objected to by defendants' counsel.

27. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the depotion of witness W. H. McMurry as were objected to by defendants' counsel.

28. Because the court erred in permitting plaintiffs to amend their complaint during the trial of this cause against defend-
34 ants' objection, by making the same show the date of the fire complained of to have been on the 20th day of August, 1889, instead of the 30th day of August, 1889, as was alleged in said complaint originally.

29. Because the court erred in permitting the plaintiffs' witness Moses Lafayette to testify as to the difference between the market value of early-cut hay and late-cut hay against the objection of defendants.

30. Because the court erred in permitting plaintiffs' witness Moses Lafayette to testify as to the value of hay baled and loaded in the cars against the objection of defendants.

31. Because the court permitted the plaintiffs' witness Moses Lafayette to testify as to the cost of taking hay from the rick and baling and loading on the cars against the objection of defendants.

32. Because the court erred in permitting plaintiffs' witness Moses

Lafayette to testify as to the value of hay on the Arkansas market against the objection of defendants.

33. Because the court erred in permitting plaintiffs' witness Moses Lafayette to testify as to what was the value of hay loaded on the cars at Wagoner, Indian Territory, as governed by the market value of hay in the markets of Arkansas, against the objections of defendants.

34. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury the contract between Mrs. Sallie M. Hailey and Ben. F. Lafayette, identified as "Ex. A, June 26th, '91, W. R. S.," against the objection of defendants.

35. Because the court erred in permitting plaintiff Lafayette, as a witness in his own behalf, to testify as to the value of other grades of hay than the hay claimed to have been burned, against the objection of defendants.

36. Because the court erred in permitting plaintiff Lafayette, as a witness in his own behalf, to testify as to the value of hay at other points than in the vicinity and neighborhood of where the hay in controversy was burned, against the objection of defendants.

37. Because the court erred in permitting plaintiffs' counsel to offer in evidence and read to the jury the book exhibited by plaintiff Lafayette and called "hay ledger," against objection of defendants.

38. Because the court erred in permitting plaintiff Lafayette, as a witness in his own behalf, to testify as to the prices received for hay at different times and different points, as shown by said book, against the objection of defendants.

35 39. Because the court erred in overruling defendants' motion made upon the close of plaintiffs' testimony to strike out all testimony offered by plaintiffs.

40. Because the court erred in permitting plaintiffs' counsel after the close of plaintiffs' testimony to amend plaintiffs' complaint by striking out the words "number 63," being the words which indicated the particular engine which set out the fire in question.

41. Because the court erred in declining to postpone the trial of this case as requested by defendants immediately after plaintiffs had amended their complaint by striking out the said words "number 63," in order to enable defendants to meet the new state of case presented by the complaint as amended.

42. Because the court erred in refusing upon defendants' motion to withdraw from the jury and strike out from this cause the written contract offered by plaintiffs.

43. Because the court erred in overruling defendants' motion to withdraw from the jury and strike out from this cause all testimony offered by the plaintiffs.

44. Because the court erred in refusing to permit witness, E. N. Ratcliff, to testify as to the proportion of hay in the rick that could be baled for sale upon the market.

45. Because the court erred in permitting plaintiffs' counsel upon cross-examination of witness E. N. Ratcliff to show by such witness

what the witness received for hay at Little Rock, Ark., against the objection of defendants.

46. Because the court erred in stating before the jury at the close of the testimony of witness F. M. Davis that the fact of some people doing a thing and other people not doing it in the same neighborhood did not establish any custom.

47. Because the court erred in permitting counsel for plaintiff- to introduce in evidence and read to the jury the contract between plaintiffs of A. D. 1888, against defendants' objection.

48. Because the court erred in refusing to permit defendants' counsel to cross-examine plaintiff, Sallie M. Hailey, as to her interests in the hay in controversy in this cause.

49. Because the court erred in refusing to instruct the jury to return a verdict in favor of defendants, as requested by defendants.

50. Because the court erred in permitting counsel for plaintiff- in their closing argument to use to the jury the following language: "We have been trying for the past ten years to bring the railroads under the control of the law like other people," against the objection of defendants' counsel.

36 51. Because the court erred in refusing to instruct the jury as requested by defendants' counsel in request- to the court numbered from one to twenty-one inclusive.

52. Because the court erred in its charge to the jury as contained in paragraphs one to fifteen inclusive, and also in that part of its charge prior to the words "the court instructs the jury."

53. Because the amount of damages assessed by the jury in this case *are* excessive.

54. Because the amount of damages assessed by the jury in this case *are* excessive and appear- to have been determined upon by the jury under the influence of passion and prejudice.

55. Because the verdict of the jury is against the evidence.

56. Because the verdict of the jury is against the weight of the testimony.

57. Because the verdict of the jury is against the law.

58. Because the verdict of the jury is against the law and the evidence.

CLIFFORD L. JACKSON,
Attorney for Defendants.

Indorsed: "No. 765. U. S. court in the Indian Territory, first judicial div. Ben. F. Lafayette and Sally M. Hailey *versus* Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway. Motion for a new trial. Filed July 10, 1891. Wm. Nelson, clerk. C. L. Jackson, att'y for defendants."

And the written objections of defendants to the entering of judgment are as follows, to wit:

In the United States Court in the Indian Territory, First Judicial Division, May Term, A. D. 1891.

BEN. F. LAFAYETTE and SALLIE M. HAILEY, Plaintiffs,
versus
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway, Defendants. } Number —.

Now at this time come the defendants by their attorney, after verdict in this case being returned by the jury, and after motion for new trial being overruled and before judgment being rendered or entered upon said verdict, and object to the court rendering or entering judgment upon the verdict rendered by the jury in this case upon the following grounds:

37 First. Because the amount of damages assessed by the jury in this case is excessive.

CLIFFORD L. JACKSON,
Attorney for Defendants.

Indorsed: "765. U. S. court in I. T., first judicial division. Lafayette and Hailey *vs.* Geo. A. Eddy and H. C. Cross, receivers of M., K. & T. R'y. Objections to entering judgment on verdict in this case. Filed July 10, 1891. Wm. Nelson, clerk."

Afterwards, to wit, on the same judicial day of said term of said court, the same being the 10th day of July, A. D. 1891, the following further proceedings were had in said cause and entered of record, to wit:

BEN. F. LAFAYETTE and SALLIE M. HAILEY
vs.
GEO. A. EDDY and H. C. CROSS, Rec'rs M., K. & T. R'y.

Now at this day come all the parties hereto and by their respective attorneys and by consent of all parties, it is by the court ordered that defendants have leave to file a bill of exceptions in this case within sixty days from the last day of this present term of this court, and that the judgment of this court entered in this cause be stayed and that no execution issue thereon during said period of sixty days, and that a writ of error may then be issued in this cause, and when lodged in the office of the clerk of this court, within ten days after the expiration of such period of sixty days shall operate as a supersedeas as to the said judgment in this case upon proper bond being given.

And further, in vacation, September 10th, 1891, the following proceeding was had:

BEN. F. LAFAYETTE and SALLIE M. HAILEY
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas & Texas Railway. } 765.

Stipulation.

Now, on this day come the parties and file a stipulation for an extension of time in which to file the bill of exceptions herein. Said stipulation is in words and figures as follows, to wit:

38 UNITED STATES OF AMERICA, *ss:*

Indian Territory, First Judicial Division.

In the United States Court in the Indian Territory, Second Judicial Division. In Vacation.

SEPT. 7TH, 1891.

BEN. F. LAFAYETTE and SALLIE M. HAILEY, Plaintiffs,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas & Texas Railway, Defendants. }

Stipulation.

It is hereby stipulated and agreed that the defendants in this case have an extention of ten days over and beyond the sixty days heretofore given them in which to file their bill of exceptions, the assignments of error, and sue out their writ of error, and give supersedeas bond and have citation issued in the above-entitled cause.

L. P. SANDELS & W. T. HUTCHINGS,
Attorneys for Plaintiffs.
C. L. JACKSON, *Attorney for Defendants.*

Indorsed: "No. 765. United States court, Indian Territory, second division. Lafayette and Hailey *vs.* Receivers M., K. & T. Ry. Stipulation for extension of time for filing bill of exceptions. Filed Sept. 10th, 1891. Wm. Nelson, clerk."

Afterwards, to wit, on the same day, in vacation, the following further proceedings were had in said cause and entered of record, to wit:

BEN. F. LAFAYETTE and SALLIE M. HAILEY
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas & Texas Railway. } 765.

Comes now the above-named defendants, by their attorneys, in vacation, and file herein their bill of exceptions.

Said bill of exceptions is in words and figures as follows, to wit:

In the United States Court in the Indian Territory, First Judicial Division, May Term, A. D. 1891, and Held in the Town of Muscogee, in and for said First Judicial Division.

BEN. F. LAFAYETTE and SALLIE M. HAILEY, Plaintiffs,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway, Defendants. } No. 765.

Bill of Exceptions.

Be it remembered the above numbered and entitled cause being called for trial at the regular May, A. D. 1891, term of the
39 United States court in the Indian Territory, held at Muscogee, in the first judicial division, Sandels, Warner & Hutchings, Esqs., appeared for plaintiffs, and Clifford L. Jackson, Esq., appeared for defendants, and the respective parties announced ready for trial.

Opening statements were made to the jury by Mr Lee Sandels, of counsel for plaintiffs, and by Mr. Clifford L. Jackson, of counsel for defendants.

Counsel for plaintiffs offered depositions of Peter Frazier, taken on the part of plaintiffs, as follows:

The deposition of Peter Frazier, taken on the 2d day of June, 1890, at the law office of C. L. Jackson, in the town of Muscogee, Indian Territory, to be read in evidence on the part of the plaintiff- in a cause now pending in the United States court for the Indian Territory, wherein Ben. F. Lafayette *et al.* are plaintiffs and Geo. A. Eddy and H. C. Cross, receivers, etc., are defendants.

PETER FRAZIER, being duly sworn, said:

My name is Peter Frazier; twenty-four years old; live in Fort Gibson, I. T.; occupation, laborer.

Ques. 1. Where and for whom were you working in the summer of 1889?

Ans. I begun work for Ben. F. Lafayette and Mrs. Hailey on July 6th, 1889, near Wagoner, I. T., making hay, and worked for them until October 19th, 1889.

Q. 2d. What were your duties?

A. My duties were to measure off the stacks of hay, see the stacks were properly built and superintend the hands in making the stacks.

Q. 3. State what occurred during your employment.

A. When I begun work the men were there cutting hay. The first stack I built was near the section-house on the Valley route. Afterwards we moved up on the M., K. & T. There were then two or three stacks already built. These hay ricks were built near the section-house on the M., K. & T. north of Wagoner, but on the right or east side of the road-bed.

Q. 4. How many ricks did you build during the summer work?

Ans. I can't tell; I kept no record.

Q. 6. Were all of the ricks built during the summer of 1889 by Lafayette and Hailey placed on the east or west side of the M., K. & T. road-bed?

Ans. All ricks built on the north side of Wagoner were built on the east side of the M., K. & T. road-bed; on the south of Wagoner some of the ricks were on the west side of the M., K. & T. road-bed.

40 Q. 7. Were you present when the fire originated?

Ans. 7. I was present.

Q. 8. Where were you when this fire originated?

Ans. I was sitting in front of a tent,

Q. 9. State the circumstances attending the origin of the fire.

—. From three to five minutes after the train went north I saw the smoke. I ran over on the pony, moved the blankets from under the saddle, and went to fighting it alone. A few minutes after that the bailing hands came up and helped me. There were six of them. There was a pretty stiff wind blowing at the time, and spread the fire so we could do no more with it. During the time we were fighting, the crew of section railroad hands came by on a hand car.

Q. 10. Did they see the fire, or stop to assist in extinguishing it?

A. They looked around as if they had seen it; they slowed up a little, but did not stop.

Q. 11. What was the extent of the fire at that time?

A. Hadn't got a very good headway at that time; was right up close to the first stack at that time.

Q. 12 State whether or not the hay burned was in the ricks; and if so, the number of ricks, the size, and how constructed.

A. It was in ricks, fifteen in all. There were nine 50 feet long, 25 feet wide at the butt, between 25 and 30 feet at the eavesing, where we began to draw in to put a top on, and 25 feet high. There were five (5) 60 feet long, about 30 feet wide, 25 feet high, and over 30 feet at the eavesing. We put them up square until we began to top off. One was 40 feet long, about 25 feet wide, 25 feet high, and between 25 and 30 feet at the eavesing.

Q. 13. How many of these ricks did you put up yourself?

A. I measured off all of the big ones. I put up six or seven of the 50-feet ones.

Q. 14. Did you count the number of ricks before or after they were burned?

A. While they were burning.

Q. 15. Are you conversant as to the rule for the measurment of hay in ricks?

A. No, sir.

Q. 16. What do you estimate the height of these ricks at the time of the fire, allowing for usual and reasonable settling?

Question objected to by defendant- for the reason that it calls for the opinion of the witness, and he is not shown to be qualified to answer. Objection overruled by the court; to which action of the court in so overruling such objection defendants then and there at the time duly excepted.

Ans. Between 17 and 20 feet.

41 Q. 17. What — the condition and quantity of this hay?

A. The condition was good, all of it, and the quantity was good.

Q. 18. What month was this hay cut in?

A. Cut in July and August; but most of it was cut in July.

Q. 19. Did you occupy any other position in the hay camp than stacking during the season in which the fire occurred; and if so, what did you do?

A. A few weeks after the fire I worked at the baler.

Q. 20. How did the quality of the hay that you baled then compare with that which was burned?

A. Part of it was put up about the same time the hay was that was burned; the other part was put up later on in the season, and was of inferior quality to that which was burned—that is, these ricks that were put up last.

Q. 21. Can you state what proportion the hay put up before the fire, and baled by you after the fire, bore — that put up and baled after the fire?

A. No, sir; I didn't see no weights. I was over on the hay field most of the time.

Q. 22. Who was manager of the hay field prior to the fire?

A. W. S. Johnson.

Q. 23. Do you know of your own knowledge whether or not the employés or agents of the receivers of the Missouri, Kansas & Texas railway were ever notified by Mr. Johnson to cut the grass from and clean up the right of way?

Question objected to by defendants' counsel because leading and suggestive. Objection overruled. To which ruling of the court defendants, by their counsel, at the time excepted and still except.

A. 23. Mr. Johnson one evening, in Miller & Co.'s store, in Wagoner, told the section foreman if he would come out and burn the grass from the right of way, to keep from burning any of the hay, he would send out the men to help him any time he wished to burn it.

Q. 24. What was the difference between the width of the ricks at the bottom and at the top?

A. They were about five — wider at the eavesing than at the bottom, but wider at the top to keep the rain from going down through the stack.

Q. 25. Did you and those with you do your best to extinguish the fire?

Question objected to by counsel for defendants as leading and suggestive.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

A. Yes, sir.

42 Cross-examination by C. L. JACKSON:

Q. 1. Mr. Frazier, didn't you state in answer to first question asked you in your direct examination that you were working for Mr. Lafayette in his hay camp in the summer of 1889?

A. Yes.

Q. 2. You afterwards stated, did you not, that you were working for Ben. F. Lafayette and Mrs. Hailey?

A. Yes.

Q. 3. Why did you say you were working for Mrs. Hailey?

A. Because I was told when I went to work there that Mr. Lafayette and Mrs. Hailey were putting the hay up.

Q. 4. Who told you this?

A. Now, I can't tell that; I can't remember. I just know it was said around there that was who it was putting it up.

Q. 5. Are you acquainted with Mrs. Sallie M. Hailey?

A. Yes, sir; I have seen her and spoken to her once or twice. I have never been made acquainted with her.

Q. 6. Did she ever tell you she was having this hay put up?

A. No, sir; I never mentioned the subject to her.

Q. 7. Is it not a fact that the only information that you ever received from anybody of the fact that Mrs. Hailey had any interest in putting up this hay came from Mr. Lafayette and those who were working under him in the hay camp?

A. No, sir.

Q. 8. How can you now recollect the sizes of the various stacks you claim were burnt in August last so as to give the exact measurement by feet?

A. I knew the location of the stacks and measured them off when we were putting them up.

Q. 9. Did you measure all the ricks or stacks of hay put up by Mr. Lafayette that summer in that neighborhood?

A. Not all of them; I measured all that were in the fire; all that were burned and some that were saved.

Q. 10. How many ricks or stacks of hay put up by Mr. Lafayette that summer did you measure?

A. I don't recollect. I kept no record of what was put up that summer, but measured all of them that I put up.

Q. 11. Are you positive that you measured and put up all the ricks that were burned in this fire?

A. I put up all the large ricks, and some of the fifty-foot ricks and helped to finish the top half of the forty-foot rick—I measured all of them.

Q. 12. When did you measure all of the ricks of hay that you say were burned?

A. Before the fire. I measured the butts at the time they were put up and I measured the ricks a few days afterwards; I did it for my own amusement; I was not told to do it.

43 Q. 13. Were you told to measure the butts of the burnt ricks, and, if so, by whom?

A. Yes, I was told by Johnson. We made the ricks according to

the size of the patch of hay we had mown down, because the hay was of good quality and we did not want to lose it.

Q. 14. I believe you stated, did you not, that you only cut hay from the grass — was the best?

A. Yes, we selected hay where the grass was the best and where we could get one or more ricks. We did this by the instruction of Johnson, the superintendent of the camp.

Q. 15. Was not the purpose in selecting spots in the prairie when the grass grew heavier and in abundance that in other places and of better quality, to get more hay from the least ground and thus save expense in putting up hay?

A. I don't know whether that was the object or not, but I suppose it was. It was less expense that way. Their object was to get the best hay.

Q. 16. How did you become acquainted with what the object of Lafayette and Johnson was?

A. Because I thought I had sense enough to know that they had to compete with other men on the market.

Q. 17. If you are through I'll now ask you to answer the question last propounded to you.

A. Nobody ever told me that that was their object in picking out the best hay. I don't know what their object was. I just did as I would have done myself.

Q. 18. But you do know, do you not, that the way in which you selected spots of the prairie to cut hay off of that you secured a class of grass that was less expensive to put up than the general run of the grass on the prairie?

A. It was less expensive in one way, but not in another. If we went ahead and cut, the men would not have to be idle and get pay when not working; when we moved about men had to be paid for the time they were standing idle.

Q. 19. Is this the only answer you can give to the last question?

A. Yes, sir.

Q. 20. Can't you state whether it would be less expense to put up the amount of hay that was burned in that fire last August, in selecting heavy spots of grass to cut from as you did, than if you were to have cut the grass thick and thin as it stood on the ground as you come to it?

A. Certainly it was less expensive to do it as we did do than to have cut the grass as we come to it.

Q. 21. You have stated, I believe, in your direct examination that you saw the engine drop the fire on the right of way, and saw the fire start in the grass within a minute or so afterward?

A. I did not state I saw the engine drop the fire, but saw the fire start from three to five minutes after the train passed.

44 Q. 22. How close were you to the fire when you first saw it?

A. About a half a mile.

Q. 23. If you were *in* half a mile away, how do you know that the fire started within five or six yards of the railroad track?

A. From the direction the wind was blowing and from where the fire started; I got there shortly after the fire started.

Q. 24. What kind of a train and engine was this that — saw going south just three or five minutes before you saw the fire?

A. A freight train.

Q. 25. What time of day was it?

A. Shortly after one o'clock.

Q. 26. How far from the junction of the K. & A. V. railroad and the M., K. & T. railway, and in which direction from that junction was it that you saw this fire?

A. A little over a mile north.

(Adjourned for dinner, from 12 to 1 30 p. m. o'clock.)

Q. 27. Where was W. J. Johnson the day of this fire?

A. He was on the hay field.

Q. 28. Do you know what part of the hay field?

A. Yes, sir; he was east of where the fire broke out.

Q. 29. In which direction were you from the fire when it broke out?

A. South; about half a mile.

Q. 30. How close were you to the line of the M., K. & T. railroad when you saw the fire break out?

A. About five hundred yards or a quarter of a mile, on the road that led to Flat Rock.

Q. 31. I understood you to say you were the first man at the fire?

A. Yes, sir.

Q. 32. Can you not state the day of the month?

A. I am not positive, but I think it was the 20th August, 1889.

Q. 33. You stated that you saw some sectionmen pass by whilst the grass was burning; is it not a fact that at that time none of the hay had burnt, and that the fire had not assumed very large proportions?

A. Yes; such is the fact.

Q. 34. Did you know who these sectionmen were?

A. No, sir; I was — personally acquainted with them.

Q. 35. Did you know whether or not they were in the employ of Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, at that time?

A. Yes.

Q. 36. How did you know it?

A. Because they went by on the car with their tools and it was work hours.

Q. 37. Do you know it in any other way?

A. No, sir.

45 Q. 38. Then, as a matter of fact, you don't know that they were in the employ of these receivers?

A. No, sir; I do not.

Q. 39. You stated that you heard Mr. Johnson speak to a section foreman in Miller & Co.'s store as to the condition of the right of way; — was that section foreman?

A. Mr. Kelly, I believe.

Q. 40. What did Mr. Kelly say?

A. He said he would do it. He agreed to go out there and set fire to the right of way and have the grass burnt.

Q. 41. Do you know on what section of the M., K. & T. R'y this man Kelly was foreman?

A. No, sir.

Q. 42. How close to the track of the M., K. & T. R'y was the closest rick of hay that burnt in the fire?

A. I do not exactly know the correct distance, but think about three or four hundred yards. I guess it would be a little over an eighth of a mile.

Q. 43. How far from the track was the farthest one that burnt?

A. I can't tell the exact distance. I take it to be about a mile and a half.

Q. 44. Did all these fifteen ricks that you say were burnt, burn from the fire, which you say you saw start?

A. Yes, sir.

Q. 45. How many ricks in that neighborhood were saved of this hay that you say you helped put up?

A. One small rick.

Q. 46. Is it not a fact that there were seventeen ricks saved?

A. Not of that quality of hay; there were of an inferior quality.

Q. 47. Who told you to say anything about inferior quality?

A. No one told me.

Q. 48. Who have you talked to about your evidence since the adjournment at dinner time?

A. Nobody.

Q. 49. Haven't you been in the company of the plaintiff, Lafayette, and some of his counsel in this case during the noon recess?

A. I met them to come up here.

Q. 50. Not a word been said to you about your testimony this morning or what your testimony would be this afternoon?

A. No, sir.

Q. 51. Then why do you change your testimony from this morning as to the quality of the hay that was left after the fire?

A. I don't think I have. I stated there was one small rick, which the fire went around, which was of the same quality as that burned. I stated there was some hay on the other side that was of inferior quality.

Q. 52. When was it that you stated that there was only one small rick of the same quality left as that burned?

A. Just a few minutes back.

46 Q. 53. Why didn't you state this morning that there was only one small rick left of the same quality as that — was burned?

A. Because I was not asked.

Q. 54. After all these explanations can't you answer a plain question, yes or no, and that is, were there not sixteen ricks of hay that were put — by you and the men you worked with there in the summer of '89, and which were saved out of this fire?

A. Yes; of an inferior quality to that that was burnt, though.

Q. 55. Do you understand that you were asked about the quality of hay?

A. No, sir; I was not asked.

Q. 56. Had Lafayette or those working in his employ with you baled any hay prior to the time of this fire in '89 in this vicinity?

A. Yes, sir.

Q. 57. How many ricks in that vicinity had been baled prior to the fire?

A. Three.

Q. 58. Were they in the burnt district or not?

A. No, sir; they were on the side of it.

Q. 59. Do you state positively that there was a single rick that had been put up in the ground that this fire burnt over, and baled prior to the fire?

A. No, sir; there was none of it baled prior to the fire.

Q. 60. Were all of the fifteen ricks that you say burned stacked up on the stubble or were any of them put out where the long grass surrounded them?

A. They were all stacked on the stubble.

Q. 61. What was the condition of the ground immediately around each of the ricks that you say were burned?

A. There was no long grass around it and no loose hay lying around. None of these ricks had been plowed around.

Q. 62. You stated this morning that you selected spots of grass to cut that would make sufficient hay for one or more ricks; now, how many spots of grass were cut, the hay from which composed the hay that went into these fifteen ricks?

A. It was almost one spot, except a few dry ditches where long weeds and blue stem grew; we skipped them.

Q. 63. How far north was the northermost stack that burnt from the southermost stack that burnt?

A. I expect it was about two and one-half miles.

Q. 64. How close to the M., K. & T. railroad track did you cut grass that went into these ricks?

A. Almost to the right of way, cut to within 75 or 80 feet of the track; perhaps 100 feet or more; I cannot tell exactly. Sometimes it was 100 yards, or more, from the tracks.

Q. 65. Then do you mean to say that you cut up and down the east side of the M., K. & T. railway track, ranging from a hundred yards from the center of the M., K. & T. railway track to within 75 or 80 feet of the center of the M., K. & T. railway?

47 A. No; from the right of way, not from the center of the track.

Q. 66. Did you not state a moment ago, and which statement has not been put in the record, that you cut this hay that went into the fifteen ricks that were burnt from land that was within 25 to 30 feet of the east line of the right of way of the M., K. & T. railway, and that the right of way extended east from the center of the track of this railway 50 feet?

A. Yes, sir.

Q. 67. How far east from the M., K. & T. railway track was the greatest distance that you cut any of this hay that was burned?

A. I should judge about two miles.

Q. 68. How much hay per acre did this hay make that you cut and put in this fifteen ricks?

A. I do not know.

Q. 69. You have given a space of country about two and one-half miles east to west and about 2½ miles from north to south that you say was burned over by this fire; do you mean to say that that ground only produced 15 ricks of hay such as you have described?

A. It produced more than that, but we did not cut it, we cut it in the shape of an "L."

Q. 70. Then, you mean, do you, that you selected scattered spots, and only cut hay here and there?

A. No, sir.

Q. 71. Didn't you state a moment ago, that you did select scattered spots to cut the hay from?

A. Yes, sir; that was one of the scattered spots.

Q. 72. Where did you get the hay from that was in the 17 ricks that you say were saved?

A. On the east side of the road leading to Flat Rock; the wagon road stopped the fire.

Q. 73. And where, with relation to the ground, that the 15 ricks that were burnt came from?

A. The seventeen ricks that were saved were south and east of a wagon road running northeast of Wagoner, and the fifteen that were north and west of this same road and between the wagon road and the railroad.

Q. 74. What distance was the closest of the seventeen ricks that were saved from the M., K. and T. railway?

A. Between 2 and 2½ miles, and the farthest one about the *the* same distance.

Q. 75. You now state, do you, that the wagon road was what saved seventeen ricks that were saved?

A. Yes, sir; with the help of the men.

Q. 76. You saved one rick, you say, that was carefully burnt around?

A. Yes, sir.

48 Q. 77. What kind of a machine was used in ricking or stacking the fifteen stacks that were burned?

A. I can't give the name; the machine is at Wagoner.

Q. 78. Did you only use one hay-ricker in putting up the thirty-two ricks of hay that you have mentioned?

A. Two rickers a part of the time; both the same kind and size machine, and both were together when I last saw them.

Q. 79. What business are you engaged in now?

A. Working around for the plaintiff Lafayette; have been working for him ever since.

Redirect examination:

Q. 1. Why was the hay on the east side of the Flat Rock road inferior in quality to that burned?

A. Because it was cut later in the season; it was cut in August.

Q. 2. What was done with the hay saved from the fire on the east side of the Flat Rock road?

A. It was baled and shipped to Fort Gibson, to Ben. F. Lafayette; it was one small rick.

Q. 3. You stated in your direct examination that part of the hay you baled after the fire was put up about the same time as that that was burned; state how much was there of that hay, and which side of the Flat Rock road was it at the time of the fire?

A. Two car-loads of it; that small rick that was saved in the fire.

Q. 4. What sort of hay was the remainder you baled?

A. A low grade on the east side of the Flat Rock road.

Recross-examination:

Q. 1. How soon after you saw the train go south, which you say started the fire, was it before you *was* another train pass along this same track?

A. About a half an hour, and it *saw* going north.

(Signed) PETER FRASER.

The deposition of John Abercrombie, taken at the time and place aforesaid, was introduced and read on the part of the plaintiff-; which is in words and figures as follows, to wit:

JOHN ABERCROMBIE, being witness of lawful age, deposes and says:

By W. T. HUTCHINGS:

Q. 1. State your age, residence and occupation.

A. Twenty-six years old; live near Elm Springs, Arkansas; farmer.

49 Q. 2. State what you were engaged in the summer of 1889, especially in the month- of July and August?

A. I was working for Mr. Ben. F. Lafayette and Mrs. Hailey. I was running the mower in putting up hay.

Q. 3. Do you — anything of the destruction of any of the — by fire, and, if so, state all you know about it?

A. Yes, sir; fifteen ricks got burned up by fire. The fire was up the M., K. & T. railroad near Wagoner, and was burning right smartly when I got there; was burning one of the ricks.

Q. 4. Do you know how and when the fire started?

A. I saw where the fire started from, but never saw it start.

Q. 5. How near to the M., K. & T. railroad bed did this fire burn?

A. Right close to it in places; some three or four feet of the ties.

Q. 6. Do you — the direction the wind was blowing that day, and whether it — high or low?

Ans. Yes, sir; it was blowing to the northeast. The wind was blowing pretty rapid the way the fire went.

Q. 7. How much hay was destroyed?

Ans. Fifteen ricks.

Q. 8. Do you know the dimensions of these ricks?

Ans. No, sir; not all of them. I worked on five or six of them and seen them measured and they measured from 50 to 60 feet long; the others were about the same.

Q. 9. When was the hay burned cut, and what was its quality?

Ans. The hay was cut in July, and it was nice green hay.

Q. 10. How much of the hay cut was not burned?

Ans. I don't remember how many stacks there was.

Q. 11. Was all of the July cutting destroyed?

Ans. No, sir; there was one rick saved.

Q. 12. Was the other hay saved of as good quality as that one rick, and if not, why not?

Ans. It was not. It was later-cut hay and was yellow; cured up in the sun more.

Q. 13. What was done with the one rick of hay saved in the group of ricks that were burned?

Ans. It was baled and shipped to Fort Gibson.

Q. 14. Why was it that the other hay was not burned?

Ans. There was a wagon road running to Flat Rock, northeast from Wagoner, and the hands prevented the fire from crossing the road.

Q. 15. Who prevented its crossing the road?

Ans. They were Lafayette's hands.

Q. 16. Do you know the width of the right of way of the M., K. & T. railroad on either side of its track?

Ans. I don't know, but I have heard that it was fifty feet.

50 Q. 17. How far were you working from the railroad at the time of the fire?

Ans. About a mile and a half.

Q. 18. Had you noticed the right of way of the road previous to the fire, and, if so, state its condition.

Ans. I noticed grass all along the right of way. They had not cut any grass along their right of way, only up between the ties.

Q. 19. Do you know anything about the rules for measurement of hay?

Ans. I know what they claim in Arkansas—that 343 cubic feet make a ton.

Answer objected to by defendants' counsel, because it is *to* a leading question, and because immaterial to the issues in this cause. Objection overruled by the court; to which ruling of the court defendants, by their counsel, at the time excepted and still except.

Q. 20. Did you ever measure the ricks in putting up this hay? And if so, give its height.

Ans. Yes, sir; they were 24 feet long.

Q. 21. Can you approximate the height of the ricks destroyed by fire?

Ans. Yes; they were from 25 to 28 feet high.

Q. 22. Were the ricks saved from the fire larger or smaller than those that were burned?

Ans. They were smaller.

Cross-examination by C. L. JACKSON:

Q. 1. Why do you state that in the month of July and August, 1889, you were working for Ben. F. Lafayette and Mrs. Hailey in putting up hay?

Ans. I was hired. Mrs. Hailey told me I was working for her. I was acquainted with both of them.

Q. 2. When and where did Mrs. Hailey tell you that you were working for her in putting up this hay?

Ans. 2. At the hotel at Wagoner, where she then lived.

Q. 3. What did she say to you on that occasion?

Ans. I don't remember now just what she did say. I boarded at her hotel two weeks—about the last week in July and the first of August, and it was during this time she told me.

Q. 4. Can't you — the words, or the substance of her words, she spoke to you in talking about this matter?

Ans. About all I remember, she said I was back again working for her and Mr. Lafayette.

Q. 5. Did she talk to you about this more than once?

Ans. No, sir; not that I remember.

Q. 6. How far *are* you from the fire when you first saw it?

Ans. I was at work about a mile and a half.

51 Q. 7. Do you know what was the cause of the fire?

Ans. A freight train passed just about the time the fire started, and I suppose that it what started —.

Q. 8. Did you see more than one freight train pass about that time?

Ans. Yes; one went into Wagoner and one went out of Wagoner about the same time.

Q. 9. Which train was it started the fire?

Ans. I think it was the one going north; I saw the fire soon after it passed on.

Q. 10. Did you see any fire before that?

Answer. No.

Q. 11. How do you know that the fire started on the right of way?

Ans. It was burned up to the road, and the wind was driving it right away.

Q. 12. Wasn't there any ricks burned south of where the fire started, and wasn't the wind blowing to the northeast?

Ans. There might have been one south of where the fire started, but I don't know where it started.

Q. 13. Didn't you go to the fire as soon as you saw it?

Ans. Yes, I went in a wagon as rapidly as I could. A man gave us a cussing for running his team so hard.

Q. 14. When and where was it that you drove a mower cutting grass in this vicinity?

Ans. I don't remember the day. It was about the 1st of July. The first hay I cut was the hay that was burnt.

Q. 15. How far north of Wagoner was any hay cut by Lafayette's men on the east side of the M., K. & T. R'y track in summer of 1889?

Ans. I don't know exactly—about 2½ miles.

Q. 16. How close to Wagoner did you cut along the east line?

Ans. About half a mile, I suppose.

Q. 17. How far east from the M., K. & T. track was the farthest point that you cut any of this burnt hay?

Ans. Almost one mile and a quarter.

Q. 18. You have heard Mr. Frasier's testimony, have you not, wherein he stated that the burnt district extended east about 2½ miles from M., K. & T. track. Are you now positive that the fire didn't extend over a mile and a quarter from the track?

Ans. The fire went clean on, but didn't burn any hay further on.

Q. 19. How close to the M., K. & T. R'y track did you cut any of this hay that was burned?

Ans. Forty or fifty yards.

Q. 20. Did anybody else cut any hay closer than that?

Ans. No, sir; not that I know of.

Q. 21. Did you not hear Mr. Frasier's statement in his
52 testimony that the hay was cut on the east side of M., K. & T. railway track at distances ranging from 75 and 80 feet to 100 yards?

Ans. I heard you ask the question, but I don't recollect hearing him state the number of feet.

Q. 22. Did you not hear Mr. Frazier answer, "Yes, sir," to a question I asked him as to whether he did not say that he cut this hay that went into the ricks that were burnt from land that was within 75 or 80 feet from the center of the track of the M., K. & T. railway?

Ans. No, sir; I don't reccollect he made that statement.

Q. 23. Will you please read question 66 of the cross-examination of Mr. Frazier, who has just been examined, and his answer to that question, and after having read it please answer as to whether Mr. Frazier's answer to that question is true or not?

Ans. I can't say whether it is true or not. If there was any hay cut that close to the track I never saw it; I never measured it.

Q. 24. Do you mean to say absolutely that no part of the hay that was burnt was cut within 25 or 30 feet of the line of the right of way, allowing 50 feet east of the center line of the track for the right of way?

Ans. Yes.

Q. 25. What was the closest to the track that any hay was cut that went into any of these ricks?

Ans. Forty of fifty yards was as close as any I saw cut.

Q. 26. How far north of Wagoner was it that this fire started that you testify about?

Ans. Three-quarters of a mile I suppose from the depot.

Redirect examination:

Q. 1. Did you examine the right of way near the fire before and after the fire, and if so, state its condition?

Ans. I noticed it every day when I was cutting along there. The grass was from half leg to knee high all along up the track. It was clean after the fire burnt off.

Recross-examination:

Q. 1. Who are you working for now?

Ans. Working for myself; farming in Washington county, Arkansas.

Q. 2. How did you happen to come from Washington county, Arkansas, to Muscogee, to give testimony in this case?

Ans. I was at Wagoner and Fort Gibson for a job and met Mr. Lafayette and he told me he would like for me to come over and give my testimony.

Q. 3. At whose expense did you come from Gibson here?

Ans. Mr. Lafayette's, I suppose.

Q. 4. Did you secure a job for this summer?

Ans. No, sir.

(Signed) J. T. ABERCROMBIE.

53 The deposition of George Wirth, taken at Muscogee, Indian Territory, in the office of C. L. Jackson, on the 2d day of June, A. D. 1890, on the part of plaintiff-, was here introduced in evidence and read to the jury, and which is in words and figures as follows, to wit:

GEO. WIRTH, being duly sworn, says:

Q. 1. What was your occupation during the summer of 1889?

Ans. Hauling water for Lafayette and Hailey. I commenced work on 22d day of June, 1889, at hay camp at Wagoner, Indian Territory, and worked about four months and a half.

Q. 2. Were you working for Lafayette and Hailey when this hay was burned in the summer of 1889?

Ans. Yes, sir; I was about 500 yards northeast of Wagoner when I saw the fire. I was about one mile and a half from the fire; I never went to the fire at all.

Q. 3. Do you know the amount of hay that was burned?

Ans. I know the number of stacks that burned, being fifteen stacks. I do not know the number of tons.

Q. 4. Do you know the dimensions of said stacks or any of them?

Ans. Yes, I stepped two of them. The two I stepped were sixty feet long. They were thirty feet wide at the butt.

Objected to—not sufficiently reliable to go to jury.

Overruled. Exception taken at the time.

Q. 5. How would the other stacks compare in size with the two you stepped?

A. They were pretty much all alike; some were smaller and some larger.

Q. 6. How many stacks, all told, were there at the time of the fire and were the stacks all together?

Ans. I could not say how many stacks there were, all told; the stacks were not all together, but scattered around four or five miles.

Q. 7. Were all the stacks destroyed by fire?

Ans. No, sir; only fifteen were destroyed by fire.

Q. 8. What prevented the fire from reaching the other stacks?

Ans. I do not know; I was not there during the fire.

Q. 9. Were all the ricks of hay in the group reached by the fire burned?

Ans. Yes; all that was burned was pretty near in the line of the M., K. & T. road-bed.

Q. 10. Was all the hay on the northwest side of the Flat Rock burned?

Ans. No, sir; I cannot say how much was saved.

54 Q. 11. Did you go on the field after the fire?

Ans. I did not go on the field for about three days afterwards.

Q. 12. Did you then count the burned stacks?

Ans. Yes, sir; there were fifteen stacks and one butt burned.

Q. 13. Do you know how long after the fire before the railroad-adjuster looked over the field?

Ans. The first time I recollect seeing the man he came and rode my pony out over the field. This was fourteen or fifteen days after the fire.

Q. 14. Had any rain fallen after the fire and before the adjuster came?

Ans. I do not know.

Q. 15. Do you know anything as to the relative difference in value as to the early-cut hay and the late-cut hay?

Ans. Yes, sir; the early-cut hay was nice and green and the late-cut hay was sunburned.

Q. 16. Do you know the difference in value per ton of the two kinds?

Question objected to by defendants' counsel because the witness is not shown to be qualified to answer.

Objection overruled by the court.

To which action of the court in overruling defendants' objection defendants then and there at the time duly excepted and still except.

Ans. Yes, sir; the early-cut hay was worth about one dollar per ton more than the late-cut.

Q. 17. About the time of the fire did you see a freight train running on the M., K. & T.?

Ans. Yes, sir; I saw a freight train running north. I saw no other train about that time.

Q. 18. Were you acquainted with the condition of the company's right of way before and after the time of the burning?

A. Yes, sir; I saw awful high grass and weeds.

Q. 19. Did the grass and weeds on the right of way extend to the track?

Ans. Yes, sir; they commenced right on the track.

Q. 20. What was the condition of the right of way after the burn?

Ans. It was nice and clean where the fire went along.

Cross-examination:

Q. 1. Why do you answer that you were working for Lafayette and Hailey in summer of 1889?

Ans. Because Lafayette told me when he hired me.

GEORGE WIRTH.

55 Plaintiffs' counsel now offered in evidence the depositions of W. S. Johnston, French Godly, Henry White, P. J. Lenhard, J. P. Linzee and John Manlove, to the introduction in evidence of which depositions defendants objected, because:

First. That no reasonable notice of the taking of said depositions was ever given defendants, as required by law.

Second. That such notice as was attempted to be given to take such depositions was not legally served.

Third. That such notice was too indefinite and uncertain to inform defendants as to place where depositions were to be taken.

Fourth. That the certificate of the officer before whom said depositions were taken shows that said depositions were taken at a different place than either the places named in the said notice.

Defendants in support of said objection read the said notice and return thereon, which is in words and figures as follows:

Notice to Take Depositions.

In the United States Court for the Indian Territory.

SALLIE HAILEY and BEN. F. LAFAYETTE, Plaintiffs,
against
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas R'y, Defendants.

To the above-named defendants:

You are hereby notified that depositions of witnesses to be read in evidence in the above-entitled cause on the part of the plaintiffs will be taken at the office of Joseph French or in the town of Price City, in the State of Missouri, on the 2d day of April, 1890, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day; and that the taking of said depositions, if not completed on that day, will be continued from day to day at the same place and between the same hours until completed.

SALLIE M. HAILEY AND
BEN. F. LAFAYETTE,
By SANDELS, WARNER & HUTCHINGS,
Their Att'ys.

And also the caption of the said depositions, which is in words and figures as follows:

"Depositions of W. S. Johnson, Henry White, French Godley, C. C. Keezee, P. J. Lenhard, J. P. Linzee and John Manlove, taken
56 on the second day of April, 1890, between the hours of eight o'clock a. m. and six o'clock p. m., at the office of Joseph French, in the city of Pierce City, in the county of Lawrence and State of Missouri, to be read in evidence in an action between Sallie M. Hailey and Ben. F. Lafayette, plaintiffs, and George A. Eddy and H. C. Cross, receivers of Missouri, Kansas and Texas Railway Co., defendants, pending in the United States court for the Indian Territory."

And also the certificate of said depositions, which is as follows:

STATE OF MISSOURI,)
County of Lawrence,) *ss:*

I, Joseph French, a notary public within and for Lawrence county, in the State of Missouri, do certify that the foregoing deposition- of W. S. Johnston, French Godley, Henry White, C. C. Keezee, P. J. Lenhard, J. P. Linzee and John Manlove *was* taken before me and *was* read to and subscribed by them in my presence, at the time and place and in the action mentioned in the caption, the said W. S. Johnston, French Godly, Henry White, C. C. Keezee, P. J. Lenhard, J. P. Linzee and John Manlove, having been first sworn by me that the evidence they should give in the action should be the truth, the whole truth, and nothing but the truth, and that their statements were reduced to writing by me in their presence. The plaintiff, Ben. F. Lafayette, being present in person and by attorney at the examination. Neither of the defendants were present in person or by attorney.

Given under my hand this second day of April, 1890.

[NOTARY SEAL.] JOSEPH FRENCH,
Notary Public.

Whereupon the court being fully advised in the premises, overruled said objection and admitted said depositions in evidence; to which said action of the court defendants then and there at the time duly excepted and still excepts.

Whereupon plaintiffs' counsel read said deposition- of W. S. Johnston, French Godley, Henry White, C. C. Keezee, P. J. Lenhard, J. P. Linzee and John Manlove, which are in words and figures as follows:

The deposition of W. S. Johnson, taken on the second day of April, 1890, at the office of Joseph French, in the city of Pierce City, in the county of Lawrence and State of Missouri, was here introduced as evidence and read to the jury.

57 W. S. JOHNSON, being duly sworn, deposeth as follows:

Q. 1. Mr. Johnson, what was your occupation in 1889?

Ans. I was employed by plaintiffs in this cause in making hay near Wagoner, in the Indian Territory.

Q. 2. What was the length of your employment?

Ans. I began on the 24th day of June, 1889, and worked until the 10th day of November of the same year.

Q. 2. What was the nature of your employment?

Ans. I was general superintendent of the hay yards. My duties were to see that the hay was properly cut, ricked, baled and loaded on the cars. I would select the patches of hay to be cut, and after it was cut would measure off the ground upon which each rick was to be stacked, and in passing from one gang of men to another I would pass by the ricks every day, and sometimes several times a day, and saw each rick as it was being built and after the hay had settled.

Q. 3. Did you measure any of the ricks after they were built?

Ans. I did not. But measured off the grounds and instructed the men as to the dimensions of each rick.

Q. 4. At the time of this fire mentioned in the complaint, how many ricks were there along the line of the railroad?

Ans. I suppose there were about thirty-two.

Q. 5. What was the average dimension of a hay rick?

Objected to on the grounds that the witness has stated that he did not measure their ricks, and that he was not qualified to answer the question.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time duly excepted and still except.

Ans. The average dimensions of these hay ricks was about as follows: When the ricks were first constructed they were made from fifty to sixty feet long, about twenty feet wide and about twenty-five feet high. The machine with which we ricked the hay threw it about twenty-five feet high. When the ricks settled the average height was about fifteen feet.

Q. 6. What experience have you had in making and measuring hay?

Ans. I have been engaged in making and measuring hay, more or less, since the year 1876, in Texas and the Indian Territory.

Q. 7. What is the customary rule of measurement, in the Indian Territory, for measuring hay?

Question objected to on the grounds that witness is not qualified to answer.

Objection overruled by the court.

58 To which ruling of the court defendants, by their counsel, at the time excepted and still except.

Ans. Three hundred and forty-three cubic feet make a ton after the rick has settled.

Q. 8. Is this the customary rule of measurement with all haymen, as far as you know?

Question objected to by defendants' counsel as leading and suggestive.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time duly excepted and still except.

Ans. It is.

Q. 9. State how the hay was situated with regard to the M., K. & T. railroad from Wagoner.

Ans. The hay was ricked along on the east side of the R. R. track as it runs north from Wagoner, located from within one-half a mile north of Wagoner to Judge Hailey's fence, which was about four miles north of Wagoner.

Q. 10. Was any of these ricks upon the right of way of the railroad?

Ans. They were not.

Q. 11. In riding along from Wagoner did you see the condition of right of way of railway from Wagoner to Judge Hailey's fence on the side on which the hay ricks were located?

Ans. I did nearly every day.

Q. 12. What was the condition?

Ans. It was neither burned nor cleaned off, but the wild grass grew over the right of way and extending nearly up to the ties of the track.

Q. 13. About what was the height of the grass on the right of way?

Ans. It was from knee high to waist high, and some places higher.

Q. 14. Was you present when a fire is said to have occurred at that point during the summer of 1889; if so, what date was it, and give the circumstances attending the origin of the fire?

Ans. I was present on the hay field when the fire originated or broke out; it occurred on the 20th day of August, 1889; owing to the constant danger of fire and the large amount of hay we had at stake, we kept two water wagons on the hay field and kept a constant lookout for fire; about two o'clock of the evening of August 20th, 1889, a freight train on defendants' line of railway passed the hay field going north from Wagoner; we could see sparks flying from the smokestack of defendants' engine; a few minutes after the train had passed smoke was seen and the alarm of fire was given; we immediately started with the two water wagons and twenty-six men to extinguish the flames and save the hay,

59 if possible; the fire started between Wagoner and the second hay rick; the wind was blowing pretty strongly to the northeast and directly towards the hay field; we fought the fire with water and all our available means until about five o'clock in the evening; I fought the fire step by step, being almost constantly in the flames until my whiskers were all burned off; we succeeded in saving seventeen ricks of hay which lay over next to the creek; the fifteen ricks nearest the railroad we were unable to save, and they burned.

Q. 15. During the time that you were fighting the fire, did any of the railroad employés pass by, and, if so, who were they?

Ans. After the fire started and before we got to it the sectionmen passed by going north on a hand car.

Q. 16. Did they make any effort to assist you in extinguishing the fire?

Ans. They did not.

Q. 17. Did you at any time call the attention of any of the railroad employés to the condition of the right of way?

Ans. I did; I called the attention of Mr. Kelly, the section foreman, to the condition of the right of way, telling him of the danger of fire; I spoke of this to him several times during the months of July and August; I offered to take our men and help him to clean off the right of way. He said it ought to be done, but he never did anything in that direction. When he failed to do it I asked him to go with me and count the ricks, so that in case of fire we would know what hay was lost, and immediately after the fire I asked him twice to go with us to see where the ricks had burned, as it was then in a condition that we could easily see what had been burned, both as to the number of ricks and as to the surface measurement of each, and he refused to go when so requested.

Q. 18. Have you any memorandum showing the dimensions of the ricks burned?

Ans. I have.

Q. 19. Were the measurements made before or after the fire?

Ans. They were made before the fire and while the ricks were being made.

Q. 20. Please give the dimensions of the ricks burned?

Objected to by defendants, because witness is not shown to be qualified to answer the question and because he has already answered that he did not measure the ricks.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time duly excepted and still except.

Ans. There were four ricks sixty feet long, twenty feet wide, and from fifteen to eighteen feet high, containing a little over two hundred and ten tons. There were nine ricks fifteen feet long, twenty feet wide and from fifteen to eighteen feet high, containing a little over three hundred and ninety-three tons. One rick fifty feet long, twenty-feet wide and from twelve to fourteen feet high, containing about thirty-five tons. One rick forty feet long, twenty feet wide and from twelve to fourteen feet high, containing about twenty-eight tons. These measurements are on the hay after it settled.

Q. 21. Were these measures made by you or under your supervision?

Ans. Partly by myself and partly under my supervision. When I did not measure them I had Charles Casee, French Godly and Pete Frazier to measure.

Q. 22. What was the cost of labor during the time you worked in the hay field?

Ans. Day labor cost us one dollar and fifty cents per day, and

men and teams two dollars and fifty cents per day. We furnished the machinery, which consisted of mowers, rakes, stackers and machinery for baling.

Q. 23. At what do you estimate the cost of making this hay as it stood in the ricks?

Question objected to by counsel for defendant-, because the witness is not shown to be qualified to answer the question, and as immaterial.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time duly excepted and still except.

Ans. Taking into consideration the price we paid for labor, teams, capital invested and machinery, I do not think it could be put in the rick for less than two dollars and fifty cents per ton. I think, perhaps, where a man was putting up a small amount, using his own team and machine furnished, and in a patch of good grass he could make wages at one dollar to one dollar and twenty-five cents per ton. But where you are cutting a large quantity and taking the grass as it comes, some good and some bad, and furnishing everything, I do not think it can be put up in the rick short of two dollars and a half.

Q. 24. When was all of this hay cut?

Ans. It was cut in the early part of July, 1889.

Q. 25. At what season of the year can hay best be cut?

Ans. In the month of July.

Q. 27. At that time was you acquainted with the market price of hay?

Defendants, by their counsel, object, because the witness is not shown to have sufficient knowledge to enable him to answer the question.

Objection overruled by the court.

61 To which ruling of the court defendants, by their counsel, at the time duly excepted and still except.

Ans. I am.

Q. 28. What was the market price of such hay at that time in the nation?

Ans. Hay of the quality of that which was burned was worth six dollars per ton, baled and loaded on the cars.

Q. 29. Were the ricks that were saved cut at the same time that those that were burned were cut, and were they of the same quality?

Question objected to by defendants' counsel as immaterial to the issues in this cause.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time duly excepted and still except.

Ans. The hay that we saved was cut fully thirty days later than that which was burned, and was of an inferior quality, worth fully one dollar per ton less.

Q. 30. Do you know at what price such hay as that saved was selling at that time in the Indian Territory?

Objected to by defendants' counsel as immaterial.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time duly excepted and still except.

Ans. Yes; it was selling at five dollars per ton.

Q. 31. What was the cost of taking the hay out of the ricks, baling and loading on cars?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time duly excepted and still except.

Ans. It cost from one dollar and seventy-five cents to two dollars per ton.

Q. 32. You have stated there were fifteen ricks of hay burned. Now state how you know the number was fifteen.

Ans. Because, first, I counted the ricks before the fire, and there were thirty-two ricks, and I saved seventeen of them; second, I counted the ricks as they burned; third, I counted the burned spots where the ricks stood after the fire, and also at this time I called the attention of the hands to the number of piles of ashes where the ricks had stood, and there were fifteen of them.

(Signed) W. S. JOHNSTON.

62 The deposition of French Godley was next introduced in evidence on the part of the plaintiffs and read to the jury.

FRENCH GODLEY, being duly sworn, upon his oath deposeth and says:

Q. 1. Where were you and what were you employed in — June and until September, 1889?

Ans. I was down in the Indian nation near Wagoner, working under Mr. Johnston on the hay ranch.

Q. 2. What were your duties?

Ans. I was assisting in stacking hay after it was cut and raked.

Q. 3. Under whose supervision did you work?

Ans. I worked in Mr. Pete Frazier's gang.

Q. 4. Were you present last summer when the fire was said to have occurred on the hay yard, and, if so, when was it?

Ans. I was present, and it occurred on the 20th of August.

Q. 5. How did you know it was on the 20th of August?

Ans. After the fire was over Mr. Johnston called the hands together and spoke of having called the attention of the railroad people to the danger of fire and called our attention to its being the 20th day of August.

Q. 6. Were you present from the time the first rick was made until the last one was made?

Ans. I was.

Q. 7. How does the M., K. & T. R. R. run through Wagoner?

Ans. It runs north and south.

Q. 8. How were the ricks of hay located with reference to the M., K. & T. railroad and Wagoner?

Ans. The ricks were located on the right-hand side of the railroad looking north from Wagoner. The first rick was located near the section and from that north about four miles to Judge Hailey's fence.

Q. 9. How many ricks of hay were there located along next to the railway?

Ans. There were fifteen ricks next to the right of way and seventeen along next to the creek. The ricks along the creek were located about a quarter of a mile east of those along the railroad.

Q. 10. Do you know the condition of the right of way along the railroad between the right of way and the hay ricks?

Ans. Yes, sir; I know the condition. The grass had not been cut or burned, and was from knee to waist high and in places higher all along the right of way and clear up to the cross-ties.

Q. 11. Just state the circumstances attending the fire that evening.

63 Ans. About two o'clock on that day I was working on a rick over next to the creek; I saw a freight train going north on the M., K. & T. railroad. In a few minutes I heard Billy Naves call to Mr. Johnston that there was a fire. I looked and saw a fire on the right of way. There was a strong wind blowing it right towards the hay field. Mr. Johnston called to us all to run and fight the fire. We all quit work and with the water wagons ran to the fire and began to fight. It was about two o'clock when we began to fight the fire and we continued to fight as hard as we could until about five o'clock in the evening.

Q. 12. How many ricks were burned?

Ans. There were fifteen burned.

Q. 13. How do you know there were fifteen ricks burned?

Ans. I counted them before they burned and after they were burned. Mr. Johnson had us go and count the burned piles and we counted fifteen.

Q. 14. While you were fighting the fire did you see any of the railroad employés?

Ans. Yes; while we were going from where we had been stacking to where the fire was I seen the sectionmen on the hand car going north, but they did not pay any attention to us.

Q. 15. Do you know whether there sectionmen saw you?

Ans. I don't know, but think they must have seen us and seen the fire, from the amount of noise we were all making and from the way the flames were rolling up from so near the track.

Q. 17. Did you notice the engines on the M., K. & T. R. R. when you was at work near the railroad, as to whether they generally cast off sparks or whether they did occasionally?

Ans. I noticed the engines, and when they were going up the heavy grade north they always cast sparks.

Q. 18. What is your age and where do you live?

Ans. My age is 55 years and I reside in Pierce City, Lawrence county, Missouri.

his own
FRENCH x GODLY.
mark.

R. H. DAVIS, *Witness.*

Counsel for defendants now move the court to strike out the testimony of the last-named witness on the ground that the witness does not connect the fire and hay with the particular fire and hay sued for in this cause.

Motion overruled by the court.

To which ruling of the court defendants by their counsel at the time duly excepted and still except.

64 The deposition of HENRY WHITE, taken on the part of the plaintiffs, was next introduced in evidence and read to the jury. Which said deposition is in words and figures as follows:

Question 1. Where were you and what was your business from June to September, 1889?

Answer. I was down in the Territory working for Mr. Johnston's hands, where they were making hay near Wagoner, in the Indian Territory.

Q. 2. Are you acquainted with the right of way along the track of the M., K. & T. R. R. between the railroad and the hay ricks?

Ans. Yes, sir; I am.

Q. 2. What was the condition?

Ans. There was grass and weeds all over the right of way from knee high up, in some places as high as my head.

Q. 3. Where were you when this fire is said to — occur.

Ans. I was at the camp and saw the freight train on the M., K. & T. R. R. going north. It was going upgrade. It seemed to be pulling very hard, and threw out a terrible smoke. Soon after the train passed I saw the smoke on the right of way. It kept getting bigger and bigger. It looked to me as though the grass caught somewhere near the second hay rick. There was a big hill near the camp, and I went up on this hill and I could then see three or four miles around. I could see the hay ricks on fire, and could see the boys fighting the fire. While here I counted the hay ricks on fire. There were fifteen of them that burned, and the next Sunday I got on a horse and rode over the burned — and again counted the number of ash piles, which could be easily seen, and I found fifteen of them.

Q. 4. Do you know anything about the size of the stacks that were burned?

Ans. Yes; I was through them most every day. With the exception of one, the ricks were large ones, much larger than those next to the creek and which were saved. The reason of this was that the hay patches were larger and grass heavier near the railroad

than it was nearer the creek. My age is 48 years, and I reside at Pierce City, Lawrence county, Mo.

his
HENRY x WHITE.
mark.

Witness:
W. S. JOHNSTON.

Counsel for defendants now moves the court to strike out the testimony of above-named deposition as incompetent, irrelevant and immaterial, and because the fire and hay testified about by witness is not shown to be the particular fire and hay mentioned in complaint.

65 Motion overruled by the court.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

The deposition of C. C. KEESEE was next introduced and read to the jury as evidence in this cause.

Which deposition is in words and figures as follows, to wit:

Q. 1. Where were you working in 1889?

Ans. I was at work near Wagoner, Indian Territory, on the hay camp of the plaintiffs.

Q. 2. Were you acquainted with the condition of the right of way of the M., K. & T. railroad between the road and the hay ricks?

Ans. I was acquainted with the condition. I left the nation about two days before the fire is said to have occurred, and at that time it was grown up with grass and weeds waist high.

Q. 3. What was your duties while employed there?

Ans. I was foreman of one of the gangs that stacked the hay, and I stepped the ground and laid off the ricks, and they were measured under my supervision.

Q. 4. State how those stacks were laid off, and what were their size.

Ans. They were about 50 feet long and twenty to twenty-five feet wide, and when first stacked were about twenty-five feet high, but when settled would be from fifteen to eighteen feet high; one of the stacks, however, of the June-cut hay was only about forty feet long and about eighteen or twenty feet wide, and about the same height of the balance of the ricks. I don't remember how many stacks were along the railroad, but none of them were on the right of way. I would call the hay in those ricks along the line of railway choice, nice hay, clear of weeds and blue stem. This hay was all cut, that was burned, between the 24th of June and 15th of July.

Q. 5. What is the difference between the value of hay cut and put up in latter part of June and July and hay put up in latter part of August and September?

Objected to as immaterial.

Objection overruled by the court.

To which ruling of the court defendants by their counsel at the time excepted and still except.

Ans. I think the difference would be at least one dollar per ton, even in putting up the same kind of hay. The hay that we cut first was much superior to that which we cut later.

66 Q. 6. What is your age and residence?

Ans. My age is thirty years and my residence is Pierce City, Missouri.

C. C. KEESEE.

The deposition of P. J. LENHARD, taken on the part of the plaintiffs, was next introduced in evidence and read to the jury.

Which said deposition is in words and figures as follows, to wit:

Q. 1. Are you conversant with hay business?

Ans. Yes; I put up prairie hay in Kansas two different years.

Q. 2. What is the rick measure of hay?

Objected to as incompetent, irrelevant and immaterial, and witness not shown to be qualified.

Objection overruled by the court.

To which ruling of the court defendants by their counsel at the time excepted and still except.

Ans. Three hundred and forty-three cubic feet or seven feet cube is a ton, when the hay is settled.

Q. 4. ——.

Ans. My age is 41 years, I reside in Pierce City, Missouri.

P. J. LENHARD.

The deposition of J. P. LINZEE, taken on the part of plaintiff, was next introduced in evidence and read to the jury.

Q. 1. Have you had any experience in the handling and measurement of hay?

Ans. One year I handled a good deal of hay in Iowa.

Q. 2. What is the rule of measurement of hay in the rick after it has settled?

Objected to because witness is not qualified to answer.

Objection overruled by the court.

To which ruling of the court defendants by their counsel at the time duly excepted and still except.

Ans. Seven feet cubed make a ton.

Q. 4. ——.

Ans. My age is 49 years; I reside at Pierce City, Missouri.

J. P. LINZEE.

67 The deposition of JOHN MANLOVE, taken on the part of the plaintiffs, was next introduced in evidence and read to the jury.

Which said deposition is in words and figures as follows, to wit:

Q. 1. Are you conversant with the measurements of hay in the rick?

Ans. Yes; during the last twenty years I have dealt in buying

and selling hay more or less, but have not dealt so very lately in hay loose; that is, have bought no hay right lately in the rick.

Q. 2. What is the rule among haymen, when the hay is settled, as to the measurement?

Objected to as incompetent, irrelevant and immaterial and because the witness is not shown to be qualified.

Objection overruled by the court.

To which ruling of the court defendants by their counsel at the time excepted and still except.

Ans. When hay is well settled three hundred and forty-three cubic feet make a ton. I dealt in hay in Jasper county, Missouri.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled by the court.

To which ruling of the court defendants by their counsel at the time excepted and still except.

Q. 3. In your opinion what is the difference between hay cut early, that is, when it first matures, and hay cut later?

Objected to as incompetent, irrelevant and immaterial, the witness not shown to be properly qualified to answer the question.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time duly excepted and still except.

Ans. I should regard the difference in price as being at least one-third.

Q. 4. What is your business?

Ans. I am a stock-breeder and liveryman. Have been breeding stock for twenty-five years. In feeding my stock I would not feed late hay at all if I could get the early-cut hay.

Defendants, by their counsel, object to the latter part of the above answer as not responsive to the question.

Objection overruled by the court.

68 To which ruling of the court defendants, by their counsel, at the time duly excepted and still except.

Q. 5. What is your age and residence?

Ans. My age is 50 years and my residence is Pierce City, Lawrence county, Missouri.

JOHN MANLOVE.

Counsel for defendants now objects to any of the testimony in any of the depositions taken in this cause on the part of the plaintiffs going to the jury on the ground that there is a fatal variance between the testimony in said depositions and the complaint of the plaintiffs in this cause, and moves the court to strike out said depositions.

Counsel for plaintiffs now asked leave to amend their complaint, making the date of the fire the 20th day of August, 1889, instead of the 30th day of August, 1889.

To which counsel for defendants at the time objected.

The COURT: The amendment will be allowed.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

Counsel for plaintiffs amended their complaint as above noted.

Counsel for defendants now asked leave of the court to amend their answer to correspond with the amendment to the complaint. Leave of the court was granted to so amend, and the answer of defendants was so amended.

Counsel for defendants now move the court to strike out all of said depositions, because they do not identify engine No. 63 as being the engine causing the fire.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

The following testimony was now offered and introduced on the part of the plaintiffs:

MOSES LAFAYETTE, of lawful age, having first been duly sworn, testified as follows:

Examined by Mr. SANDELS:

Q. 1. What relation are you to the plaintiff, Ben. F. Lafayette?

A. His brother.

Q. 2. Are you any relation to Mrs. Hailey?

A. None whatever.

69 Q. 3. Were you present at any time during the summer of 1889 on the hay fields near Wagoner?

A. Yes, sir.

Q. 4. Do you know whether or not a fire occurred there during the summer of 1889?

A. Yes, sir.

Q. 5. Were you present before or after the fire?

A. Both before and after.

Q. 6. Who had charge of the camp?

A. W. S. Johnson.

Q. 7. The party whose deposition was taken?

A. Yes, sir.

Q. 8. Before the fire did you at any time count the ricks of hay?

A. Yes, sir; I did.

Q. 9. What was the total number of ricks put up?

A. Thirty-two (32).

Q. —. After the fire, did you count the number of ricks then remaining?

A. Yes, sir.

Q. 11. How many?

A. Seventeen (17).

Q. 12. How long after the fire was that?

A. The next day.

Q. 13. Did you also count on the prairie the burned places?

A. No, sir; just the number of ricks standing.

Q. 14. Were you acquainted with the market value of hay at Wagoner during the season of 1889?

A. Yes, sir; I was.

Q. 15. Was there any difference between the market value of early-cut hay and late-cut hay?

Question objected to as incompetent, irrelevant and immaterial.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

A. Yes, sir.

Q. 16. What was the market value of early-cut hay?

A. Six ($6.00) dollars per ton.

Q. 17. In the rick?

Questions 16 and 17 objected to by counsel for defendants as incompetent, irrelevant and immaterial.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

A. No, sir; baled and loaded on the cars.

70 Q. 18. What was the value of late-cut hay?

A. One dollar less.

Q. 19. In the same condition?

A. Yes, sir.

Q. 20. Baled and on the car?

A. Yes, sir.

Q. 21. Do you know of your own knowledge anything of the value of baling hay? The cost of taking from the rick and putting into bales and putting on the cars?

Question objected to as immaterial.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the — excepted and still except.

A. Yes, sir.

Q. 22. You state that you do know the cost?

A. Yes, sir.

Q. 23. Please state what is the cost of taking from the rick and baling it and loading on the car?

Question objected to as immaterial.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

A. $1.75 to $2.00 a ton.

Q. 24. Now I will ask you to itemize that cost. How much was the cost of baling and how much the cost of hauling?

Question objected to as incompetent, irrelevant and immaterial.

Objection overruled by the court.

To which ruling of the court, defendants, by their counsel, at the time excepted and still except.

A. I should say that the cost of hauling would be fifty cents a ton. We paid $1.50 a ton for baling.

Q. 25. Do you know whether there was or was not a market value for baled hay, or for hay, at Wagoner, in large quantities, during the summer of 1889?

A. No, sir; there was not.

Q. 26. On what market was the market value of hay there determined?

A. On the Arkansas market.

Q. 27. At what towns?

A. Fort Smith; Little Rock.

Counsel for defendants objects to this testimony and asks the court that it be withdrawn from the jury because the witness has stated that there was a market value at Wagoner.

71 Objection overruled by the court.

To which ruling of the court defendants at the time excepted and still except.

Q. 28. Governed by the Arkansas market, what then was the value at Wagoner?

A. The price that we received.

Q. 29. Governed by the market value of hay in the markets of Arkansas, what was the market value of hay at Wagoner?

Question objected to as incompetent, irrelevant and immaterial.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

A. Five and six dollars a ton, loaded on the cars.

Cross-examination by Mr. JACKSON:

Q. 1. Where did you reside during the summer of 1889?

A. Partly at Wagoner, and partly at Fort Gibson.

Q. 2. Right in that vicinity?

A. Yes, sir.

Q. 3. How far apart are Fort Gibson and Wagoner?

A. Fourteen miles.

Q. 4. Do you know of any other person selling hay at Wagoner during the summer of 1889?

A. No, sir; I didn't pay much attention to it.

Q. 5. Do you know whether Mr. Davis, one of the merchants there, was handling hay at the time?

A. I couldn't say.

Q. 6. Couldn't say whether there was anybody else handling it or not?

A. No, sir.

Q. 7. Did you ever see any other hay in the vicinity of Wagoner beside that you cut?

A. Yes, sir.

Q. 8. You saw other hay in ricks in that vicinity?

A. No, sir.

Q. 9. Saw none other in ricks?

A. No, sir.

Q. 10. You know of Mr. Scott, a merchant at Fort Gibson, handling hay during that season, do you not?

A. Yes, sir.

Q. 11. Did you know of any hay in the vicinity of Fort Gibson in ricks during the summer of 1889?

A. No, sir; I cannot say that I did.

Q. 12. Was hay brought into the town of Fort Gibson frequently?

72 A. No, sir; I don't think so. Mr. Scott was baling hay at Corita, six miles from Wagoner and six miles from Fort Gibson.

Q. 13. Did you know of any hay in ricks in the vicinity of Corita?

A. I saw some ricks there, just in passing through on the train.

Q. 14. As a matter of fact, isn't it true that there was a great deal of hay in that section of the country, in the neighborhood of a few miles around there, put up in the summer of 1889?

A. It might have been so; I don't know. Not immediately around there — we were.

Q. 15. You did see some about Corita, six or seven miles away?

A. Yes, sir.

Q. 16. Now, as to your particular hay, the hay of your brother, what do you know as to when he baled any hay and shipped from Wagoner during the summer of 1889?

A. What do I know as to any?

Q. 17. Yes, sir.

A. I don't understand you exactly.

Q. 18. Did he bale and ship any from Wagoner during the summer of 1889—your brother?

A. Yes, sir.

Q. 19. Where did the hay that he baled and shipped from Wagoner come from?

A. It came from round about Wagoner.

Q. 20. Well, with reference to where this hay was burned. Did any of it come from in there?

A. Yes, sir.

Q. 21. How much hay, if any, had been shipped by your brother from the immediate vicinity of where this fire was, during that summer?

A. I could not say, sir. All our early-cut hay, put up in June and July, — located where the fire was. Hay baled later was late-cut hay. I could not say exactly the time it was baled and shipped, but it was during the season of 1889.

Q. 22. Do you mean this: that in baling your hay and shipping it you picked out the earliest-cut hay first—got it on the market?

A. You have to.

Q. 23. Is that the way you did?

A. When we start to ship we always bale that when we have it. But this season we were ricking before we commenced baling.

Q. 24. When you commenced to ship, did you ship early-cut hay and the later afterwards? Is that what you mean?

A. I couldn't say, sir.

Q. 25. You don't know, then, which you shipped first?

A. No, sir.

Q. 26. Didn't you attend to the shipping of it?

—. Mr. Johnson attended to the shipping of it. I was over at Wagoner occasionally to see whether things were going
73 on right. Mr. Johnson was at the camp. He attended to baling and loading, etc.

Q. 27. You had no idea what he was doing?

A. Oh, yes; he reported every week what he was doing.

Q. 28. What do you mean by speaking of getting out early-cut hay?

A. All hay we ship early is early-cut hay. When we stack, we sometimes put up early and sometimes late cut.

Q. 27. What was the first hay put up in the summer of 1889? What particular hay was it?

A. The first hay we put up?

Q. 30. Yes, sir.

A. It was put up in Wagoner.

Q. 31. I mean the first hay cut.

A. Around Wagoner.

Q. 32. Was it the hay that was burned or not?

A. The hay we first cut and put up?

Q. 33. Yes, sir.

A. Well, sir, I couldn't say. We had three or four ricks on the west side of the track. I don't know whether those three or four ricks were put up at the same time. I am satisfied that was among the first hay put up.

Q. 34. Then these three or four ricks on the west side of the track and these fifteen that you say were burned were the very first hay that was put up that season?

A. Yes, sir.

Q. 35. What became of the three or four ricks on the west side of the track?

A. They were baled and shipped.

Q. 36. When?

A. I couldn't say exactly; during that season.

Q. 37. Could you say when, with respect to this particular fire?

A. No, sir.

Q. 38. No idea at all?

A. No, sir; I couldn't say the date.

Q. 39. Can you tell the jury when you first shipped any hay from Wagoner that year?

A. I couldn't tell that date exactly.

Q. 49. Can you say when, with reference to this fire?

A. No, sir; I think not; I think we started to bale in the fore part of October; I couldn't say positively.

Q. 41. Your best opinion is that there was no hay shipped at all before this fire from Wagoner by your brother?

A. I don't think there was; our books will show.

Q. 42. You were running up there occasionally to look after things, weren't you?

A. Yes, sir.

74 Q. 43. While Mr. Jackson was your particular manager, you had the matter generally in charge?

A. I used to run over there once in a while.

Q. 44. Well, about how often would you go over to Wagoner to see how things were getting along?

A. Sometimes once a week; sometimes once in ten days; sometimes oftener; whenever he wanted information. He could not leave the field, so he telegraphed me, and I went.

Q. 45. Did you generally go out to the field when you went to Wagoner?

A. Yes, sir; invariably, unless I was there just for a night, and would go back to Fort Gibson in the morning.

Q. 46. Where were those three or four ricks of hay on the particular occasion of this fire?

A. Well, sir, they were about—I wouldn't say exactly the distance; perhaps a mile southwest of the fire, on the west side of the M., K. & T. track, and south.

Q. 47. Were they still standing?

A. Yes, sir.

Q. 48. They hadn't been baled and shipped?

A. To the best of my knowledge, they had not. They possibly might have been baled and shipped; I couldn't say positively. I know we ricked on both sides of the track about the same time. The first baling of that was on the west side of the track.

Q. 49. About the time of this fire you were watching your hay pretty closely, were you not?

A. No, sir; I was at Fort Gibson on the day of the fire.

Q. 49½. I understood you to say that you were on the ground?

A. I was on the ground the day after the fire. I was on the ground on one or two other occasions when the grass took fire from the engine.

Q. 50. You recollect this very clearly?

A. I recollect this one time; yes, sir.

Q. 51. Now, Mr. Lafayette, can you tell the jury whether these three or four ricks of hay on the west side of the track were standing on the day of the fire?

A. I couldn't say; no, sir. I wouldn't be sure whether they were baled or whether they were still standing in the rick, but I do know that it was the first hay baled; I remember that very distinctly.

Q. 53. How do you know that?

A. Because I was there myself. Started the bailer myself and started to bail that afternoon.

Q. 54. You said you didn't know which hay was first baled out?

A. I now remember that.

Q. 55. What brings that to your mind now?

A. I just happened to think of it.

75 Q. 56. You use the word "we" all the time. What do you mean by "we"?

A. I should say my brother, but as we are associated together now I say "we."

Q. 57. What were your relations then?

A. It was very dull at Fort Gibson. I liked out-of-door life pretty well, as I do now; liked to go there.

Q. 58. Do you state positively that this hay that was burned belonged to your brother?

A. Yes, sir; my brother and Mrs. Hailey.

Q. 59. How do you know that this hay belonged to your brother and Mrs. Hailey?

A. Because I saw the contract between my brother and Mrs. Hailey.

Q. 60. When and where did you see the contract?

A. At Fort Gibson, sir.

Q. 61. When was that contract made?

A. I don't remember exactly the date. It was after the commencement of the season.

Q. 62. At the time of the commencement of that season?

A. I think so; made that season.

Q. 63. Was the contract signed?

A. Yes, sir.

Q. 64. By whom was it signed?

A. By my brother and Mrs. Hailey.

Q. 65. At that time was Mrs. Hailey a single or a married woman?

A. She was a married woman.

Q. 66. Where was her husband?

A. He was at Wagoner.

Q. 67. Where they living together?

A. Yes, sir.

Q. 68. Can you state positively to this jury that there were fifteen ricks of hay that were burned in this fire the day before you were there?

A. I didn't count the ricks that were burned. We had thirty-two ricks of hay. Mr. Johnson and I rode from his house to town and counted seventeen ricks standing.

Q. 69. When had you been to this hay camp prior to the day after the fire?

A. I couldn't state exactly the date.

Q. 70. About?

A. Possibly a week before. Some time during the week before.

Q. 71. Then, of course, you could not say to the jury whether any of the hay was baled out that stood in the burned district prior to the day of the fire?

A. Yes, sir; because I know the baler was this side of the fire.

76 Q. 72. You don't know where it was before the fire?

A. It was across the track before the fire. We baled the hay first across the track and moved the baler, and there was a stack this side of where the fire caught.

Q. 73. How do you know that this baler was not on this burned district during the week you were not there?

A. Wasn't in the burned district?

Q. 74. Yes, sir.

A. I know where it was when I reached Wagoner.

Q. 75. You know where it was when you were there before?

A. Yes, sir.

Q. 76. Of course, you don't mean you know where it was when you were not there?

A. I could tell very near where the baler was, where the remains of the stack was when it was baled.

Q. 77. Do you state as an absolute fact, of your own personal knowledge, that in the time prior to this fire and since you had been to Wagoner before the fire, that the baler had not been in the burned district before the fire?

A. Yes, sir.

Q. 78. How do you know it?

A. Because there was no hay to stack.

Q. 79. You were not there?

A. I could tell when a stack was baled up and whether it was burned out.

Q. 80. How could you tell?

A. I could tell from the ashes.

Q. 81. How could you tell from the ashes?

A. Simply because burned hay has ashes that high (indicating). Where it is baled there is a little waste and there is probably four or five inches.

Q. 82. You are satisfied, then, from that alone, that the baler was not in the burned district while you were gone?

A. Yes, sir; if it had been it would have been burned up, I should suppose.

Q. 83. Do you recollect Mr. Beagle coming up to meet you at Wagoner, with reference to looking over this ground?

A. Yes, sir.

Q. 84. Do you recollect going out over that ground and your attention being called to the fact that in some places the ash pile was very high and in others not so high?

A. Yes, sir; that was a month afterward.

Q. 85. Do you recollect, further, that your attention was then called to the fact that at particular patches of these ashes, where the old rick had once been, there were pieces of wire and stuff of that kind, and coal and coal ashes, such as is left around a rick which has been baled?

A. No, sir.

77 Q. 86. Do you not recollect that at least two, if not three, of those particular spots where you say ricks of hay were burned, your attention was called to where an engine and boiler had stood?

A. No, sir.

Redirect examination by Mr. SANDELS:

Q. 1. After the fire, how long was it before Mr. Beagle came down and went out there with you?

A. I couldn't say; it was several months thereafter, in the winter time some time.

Q. 2. Several months?

A. Yes, sir.

Q. 3. Do you know anything of this book (handing book to witness)?

Ans. Yes, sir.

Q. 4. What book is this?

A. This is the book in which we kept a record of the hay which we shipped.

Q. 5. In whose handwriting?

A. The handwriting is by my brother and myself.

Recross-examination.

By Mr. JACKSON:

Q. 1. Will you please tell the jury whether or not you had any interest in this hay business carried on in that hay camp and in the particular hay which you say was burned and which is sued for in this cause?

A. No, sir.

Witness discharged.

The court now adjourned until Friday, June 26th, 1891, at 9 o'clock a. m., at which time the trial of this cause was continued, as follows:

Counsel for plaintiff now offered in evidence the deposition of F. O. Voetler, to which counsel for defendant objected on the grounds that the statements of the witness Voetler contained in said deposition were incompetent, irrelevant and immaterial.

Which objection was by the court overruled and to which action of the court in so overruling said objection defendants' counsel then and there at the time duly excepted and still excepts.

Whereupon said deposition of F. O. VOELTER, taken on the part of plaintiff was read to the jury.

Which said deposition is in words and figures, as follows:

78 "My business during the year 1889, was general commission business and dealer in coal. Only knew the prices of hay in the Indian Territory during the summer of 1889, from what parties quoted to me. They were invariably quoted to me at prices

delivered in Fort Smith. They ranged from 86 to 88, delivered on track at Fort Smith.

Q. From whom did you get quotations?

A. Ben. F. Lafayette, one of the plaintiffs in this case, who resides at Fort Gibson, I. T.; Ed. McKenna, whose hay was at Campbell, I. T. I think McMurry, whose store is at Cameron, I. T. Lafayette priced me hay at 86 per ton delivered at Fort Smith, in the beginning of the season. In the latter part of the season he priced me hay at 86.50 per ton. I think Mr. McKenna priced his hay at 87 per ton. I don't remember McMurray's figures now. I know he told me he didn't care to sell his hay; that he preferred to hold it. I know the reason Mr. Lafayette made the difference between 86 and 86.50 for his hay, that cut in the latter part of the season not being as good as that cut first of the season.

Cross-examined:

My knowledge of the reason why Lafayette made a difference in the hay was obtained from Lafayette in person and from my knowledge of the difference of the hay received. That received the first part of the season being very good and the last being of inferior quality. The first hay received from Lafayette was, say about the middle of August. I can't be exact without my invoice. The last I received from him was, I think, late in September. The hay priced to me by *defendant*, Lafayette, at 86 and 86.50 per ton, as I have stated in my direct testimony, was the price of hay delivered to me at Fort Smith, in car-load lots as I should order them, without binding either party to take or deliver any given quantity or quality of hay. Mr. Lafayette and myself were perfect strangers until last summer, when I saw his sample of hay in the Hotel Main, at Fort Smith. On the strength of his sample I bought two car-loads from him and our business relations being of a very pleasant nature, I confined my purchases of hay to Mr. Lafayette, and he protected my trade by not selling hay to any one else here. I continued buying from Mr. Lafayette until he was unable to furnish me hay; I only bought eight cars from him; my first car was bought from him August 22, 1889; price of hay 86.50 per ton; the last car was shipped on September 20th, 1889, billed at 85 per ton, f. o. b. Wagoner; this with freight, made the last four cars cost me 86.50 per ton at Fort Smith; I bought six car-loads in all from Mr. Lafayette.

(Signed) F. O. VOELTER."

Counsel for plaintiff- then offered in evidence the deposition of Ed. McKenna, to which counsel for defendant- objected on
79 the ground that the statements therein contained were incompetent, irrelevant and immaterial, which objection was by the court overruled, to which action of the court in so overruling said objection, defendant- then and there at the time duly excepted.

Whereupon, said deposition of said McKENNA was read to the jury, and is in words and figures as follows:

I was acquainted with the price of hay in the Indian Territory during the summer of 1889.

Q. What were the market prices?

A. I bought a large quantity of hay delivered at Cameron, I. T., on the cars at $6 per ton; I bought probably four hundred tons that season; there was no criterion by which to base a market value, only by agreement between buyer and seller. J. H. McClure had a large quantity of hay to sell, and the firm of McKenna & McDonald took it off his hands in exchange for goods; we had furnished him goods and that was the price we paid in settlement of his account; I am a member of the firm of McKenna & McDonald; Cameron is a station on the St. Louis and San Francisco railroad, twenty-one miles south of Fort Smith, in the Choctaw nation.

Cross-examination:

Q. Did not the purchase of hay from McClure that you speak of in your direct examination constitute your knowledge and experience of the hay market during the year 1889, except as you might have derived knowledge from or had experience in the sales of hay at the city of Fort Smith?

Ans. Yes.

Redirect examination:

Q. Was this transaction with McClure the only purchase you made?

Ans. Yes.

Q. On what information or understanding did you base your statement that the market price of hay was $6 per ton on board cars at Cameron, I. T.?

Ans. The price ruling in Fort Smith at the time.

Q. Is not Fort Smith the natural market for hay cut and shipped from Cameron?

Ans. Yes.

Q. Is not the market price of hay at Cameron, I. T., governed by the market price of hay at Fort Smith?

Ans. Yes.

Q. Is it not a fact that the only hay handled in Fort Smith is Territory and Kansas hay?

Ans. Yes; but mostly hay from Kansas.

ED. McKENNA.

80 Whereupon, counsel for plaintiffs offered in evidence deposition of W. H. McMURRY, to which defendants objected on the ground that the statements therein contained were incompetent, irrelevant and immaterial, which objection was by the court overruled, and to which action of the court in so overruling such objection, defendants then and there at the time duly excepted and still excepts. Whereupon, counsel for plaintiffs read said deposition to the jury, which said deposition is in words and figures as follows, to wit:

Q. Where did you do business in 1889?

A. I had an interest in a general mercantile business at Cameron, I. T., conducted under the name of J. Reynolds & Co. Also had about 400 tons of hay cut near Cameron, I. T. Was engaged in the cotton-buying business in Fort Smith, Ark., and Memphis, Tenn.

Q. Were you acquainted in the year 1889 with the market price of hay in that part of the Territory?

A. We did not sell hay enough at Cameron to establish a market price, but all of our hay *that* was sold on the market price of hay at Fort Smith as a basis.

Q. What did that make the price of hay on board the cars at Cameron?

A. Six dollars and a quarter to six dollars and three-quarters. The first sales were not made later than the 1st of August.

Q. Taking the season through what was the average price on board the cars at Cameron?

A. Six dollars and a quarter per ton would be the average price.

Q. What was the cost of baling the hay from the rick and putting it on board the cars?

A. The baling cost me $1.50 per ton, the hauling and loading 75 cents to $1 per ton. I have been informed that it could be loaded a little cheaper up the country.

Q. How far were your meadows from the cars?

A. The nearest point was about a mile and a quarter.

Q. What is the actual cost of hay in the rick?

A. I would state that it could be put up in the rick for two dollars per ton. This estimate does not include royalty on the hay profit or anything on account of the money invested in machinery or any returns on amounts paid out for labor. This simply covers the amounts actually paid out for cutting and stacking the hay. I put the two dollars as about an average of good and bad hay.

W. H. McMURRY.

81 BEN. F. LAFAYETTE, of lawful age, having first been duly sworn, on the part of the plaintiffs, testified as follows:

Examined by Mr. ROGERS:

Q. 1. Are you one of the plaintiffs in this suit?

A. Yes, sir; I am.

Q. 2. Are you a white man or an Indian?

A. A white man.

Q. 3. Is your coplaintiff, Mrs. Hailey, white or Indian?
A. She is Indian.
Q. 4. Where was she residing in the summer of 1889?
A. At Wagoner, Creek nation, Indian Territory.
Q. 5. What was your business during the summer of 1889?
A. I was in the mercantile business at Fort Gibson, also baling and shipping hay.
Q. 6. Who was interested with you in baling and shipping hay that summer?
A. Mrs. Sallie M. Hailey.
Q. 7. Was the contract an oral or a written one between you and Mrs. Hailey?
A. A written contract.
Q. 8. Is this the written contract, and, if so, who signed it?
A. Mrs. Hailey and myself; signed at the residence of Buck Rogers.

Said contract is now offered in evidence by plaintiff-.

Counsel for defendants objects to the introduction in evidence of this contract for the reason that it is a contract on the part of one of the parties, at least, who was incapacitated at the time of making it to make any contract whatever. The date of the contract is May 24th, 1889, and the testimony of Moses Lafayette, a witness on the part of the plaintiff-, is that at that time the husband of Sallie M. Hailey was living; that they were living together as man and wife in the Creek nation. Therefore this contract is null and void and not proper for any purpose in this cause.

Pending the ruling of the court upon above-noted objection, witness was interrogated by counsel for defendants as follows:

Q. 9. At the time this contract was entered into, were you or not a licensed trader?
A. I was a post trader.
Q. 10. Were you or not a licensed trader?
A. I do not know what you consider a licensed trader. I was not in the same position I am now. I was a post trader appointed by the War Department.
82 Q. 11. You had a license authorizing you to do business in the Indian Territory?
A. On the Government reservation.
Q. 12. Was that Government reservation in the Indian Territory?
A. Yes, sir.
Q. 13. You were authorized to do business in the Indian Territory?
A. On the Government reservation; that is the way it reads.
Q. 14. Have you the authority you had at that time to do business?
A. I have it at home; yes, sir.

Counsel for defendants asks that the witness be required by the court to produce the authority above referred to.

Motion overruled by the court.

To which ruling of the court defendants at the time, by their counsel, excepted and still except.

Counsel for defendants now further objects to the introduction in evidence of the contract above referred to, because the witness was doing business in the Indian Territory under license from the United States.

(By counsel for plaintiffs:)

Q. 15. A member of what Indian tribe was Mrs. Hailey?
A. Creek.

(By counsel for plaintiffs:)

Q. 16. Where was this contract made to cut this hay?
A. In the Creek nation; in the vicinity of the Creek nation.

(Counsel for plaintiffs:)

Q. 17. Was Mrs. Hailey's husband an Indian or a white man?
A. He was a white man.

Counsel for defendants also further objects to the introduction of the contract above referred to for the reason that it is unlawful for a licensed trader to cut hay in the Indian Territory except for use in feeding stock, etc.

(Counsel for defendants:)

Q. 18. At the time this contract was entered into and after that time, up to and including the month of August, 1889, was Mrs. Hailey a married woman and living with her husband in the Creek nation?
A. Yes, sir.

All the foregoing objections to the contract above referred to were now by the court overruled; to which ruling of the court defendants, by their counsel, at the time excepted and still except.

Counsel for plaintiffs now offered in evidence and read to the court and jury the contract above referred to, and which is
83 hereby referred to and made a part of this record, marked "Exhibit A, June 26, '91, W. R. S.," and is in words and figures as follows, to wit:

"MUSCOGEE, IND. TER., *May 24th*, 1889.

This contract, made and entered into between Sallie M. Hailey, a citizen of the Creek nation, Ind. Ter., and Ben. F. Lafayette, a citizen of the United States, but lawfully resident in the Indian Territory, witnesseth: That said party of the first part, viz., Sallie M. Hailey, agrees to cut, bale and deliver 2,000 tons of hay at Wagoner, Ind. Ter., during the year 1889, and the said Ben. F. Lafayette, party of the second part, agrees to furnish all the money necessary to secure the delivery of said hay at said town or depot of Wagoner, and to pay all expenses incident thereto, and that properly belonging to his part of this contract.

And it is further agreed between both parties hereto that, whereas a deficiency exists on the part of the first part hereto, to wit, Sallie M. Hailey, growing out of a contract between both of us for the year 1888, that after said deficiency or deficit under the contract of 1888 has been paid out of the net profits of the contract for the year 1889 (that is to say, the present contract and out of her interest in the same to the amount of said deficit) then the said Sallie M. Hailey is to have a one-third interest in the net profits realized under this contract.

It is further understood that no other person save the contracting parties hereto is in anywise interested in this contract or is to partake of its profits, should there be any.

SALLY M. HAILEY.
BEN. F. LAFAYETTE.

Witness:
D. M. WISDOM."

Q. 19. How is the M., K. & T. road located with reference to Wagoner?

A. It runs north and south, right through the town.

Q. 20. Do you know how near it runs to where this hay was cut?

A. No, sir; I do not. I did not visit the hay fields.

Q. 21. Do you know personally anything about the putting up of the hay?

A. All I know is from the advices I received.

Q. 22. How long have you been in the hay business?

A. Since 1888.

Q. 23. How long have you been in it in the vicinity of Wagoner?

A. During the years 1888, 1889 and part of the year 1890.

Q. 24. Was there any market in the vicinity of Wagoner for hay put up in large quantities?

A. There was not, sir.

84 Q. 25. Do you know where the natural market was for hay in such quantities, put up in the vicinity of Wagoner?

A. It was shipped altogether to the Southern market—Fort Smith, Little Rock, Memphis, and sometimes New Orleans; as far south as Georgia; on the Iron Mountain road to Wyandotte.

Q. 26. Did you have then the market price of hay in these markets?

A. Yes, sir.

Q. 27. Based upon the market price of hay in those markets, state to the court and jury what was the market price of hay at Wagoner?

A. There are two grades of hay. There would be two prices of hay.

Counsel for defendants objects to any testimony as to the market price of any quality of hay other than the quality of hay alleged to have been burned or destroyed as incompetent, irrelevant and immaterial.

Objection overruled by the court.

To which ruling of the court defendants at the time, by their counsel, excepted and still except.

Q. 28. Is there any difference in the market price of early-cut hay and late-cut hay?

Question objected to as incompetent, irrelevant and immaterial.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

A. Yes, sir.

Q. 29. Based, then, upon your knowledge of the market value of hay in the markets you just spoke of, what was the market price of early-cut hay in the vicinity of Wagoner?

Question objected by counsel for defendants as incompetent, irrelevant and immaterial.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

A. The market price of early-cut hay was six dollars ($6.00) per ton. The market price of late-cut hay was five dollars ($5.00) per ton, at Wagoner.

Q. 30. State what you mean by the market price. Whether it was baled hay put on board the cars or not?

A. We sold all our hay free on board the cars. We could not sell it in any other way. They would not have it in any other way. All we sold was either delivered or free on board the cars.

85 Q. Do you know what it costs to bale and put hay on board the cars?

Question objected to by counsel for defendants as incompetent, irrelevant and immaterial.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

A. I know that.

Q. 32. State.

A. I know what we paid for it. We paid $1.50 per ton for baling. We paid, I think, from 35 to 50 cents per ton, according to the distance, for hauling.

Q. 33. Now I will ask you if the hay that was put up there was put up under this contract between you and Mrs. Hailey?

A. Yes, sir.

Q. 34. Will you look at this book and see what it is (handing witness a book)?

A. That is my handwriting, and is the record of shipments of hay.

Q. 35. Is all of it your handwriting.

—. ——.

Q. 36. Were those entries made contemporaneously with the shipments of hay?

A. Yes, sir; showing the shipment of the hay.

Q. 37. What do you call that book?

A. That is a ledger.

Q. 38. It is your hay ledger?

A. Yes, sir.

The book above referred to was now offered in evidence by counsel for plaintiffs.

The COURT: Were the entries made contemporaneously with the transactions?

A. Yes, sir.

Counsel for defendant- objects to the introduction of this book as incompetent, irrelevant and immaterial.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

Q. 39. Will you just turn over there and look at those pages and tell where the towns were that the hay was shipped to?

A. Yes, sir.

Q. 40. State where that hay there was shipped to and what was the number of the car and number of bales?

86 A. (Referring to book.) S. Shuttles, Hot Springs, Ark., August 6th, 294 bales; weight 20,600 pounds at $11 per ton. Car, Iron Mountain, No. 1852.

Counsel for defendants asks that this testimony be stricken out and objects to the introduction of any testimony from this book as incompetent, irrelevant and immaterial.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

And it is understood and agreed that the same objection, ruling and exception shall apply to any and all testimony taken from this book.

Q. 41. What hay was that?

A. That, as reported to me by my manager, was cut in the latter part of July.

Q. 42. You say $11 per ton?

A. Yes, sir: delivered at Hot Springs. The reduction of the freight bill was $61.88, leaving a balance net price of the hay of $51.53.

Q. 43. What was that?

A. Ten tons; a little over $5 per ton.

Q. 44. That was at Hot Springs?

A. Yes, sir (reading from book): Desha Lumber and Planting Company, Arkansas City, Ark., August 6th, 1889. Car, I. M., 2774; weight, 24,170. $5 per ton, $60.43.

September 24th, Mo. Pac. car, 12652; 260 bales, weight, 17,136 pounds, at $5 per ton; net, $42.84.

Seventy to seventy-five car-loads sold at points in Arkansas:

F. O. Voelter, Fort Smith, Ark., August 19th, 290 bales hay, weight, 23,240 pounds, at $6.50 per ton, $75.44; less freight, $17; balance, $58.44 for that car. Border City Ice and Coal Co., Fort Smith, Ark., August 9th, 246 bales, weight, 21,560 pounds, $7 per ton, delivered; less freight, $17; making net $58.44.

A. L. Shader, Little Rock, Ark., 266 bales, weight, 21,760 pounds, $6.60 per ton, $71.81; less freight, $24.98; net, $46.83. I will state in connection with that that we had an eight-cent rate to Little Rock. There is an overcharge in this. Freight should be $16 instead $24.98.

Hearne Lumber Co., Wyandotte, Ark., August 22d, St. L. & I. M. car 472; 233 bales; weight, 26,040 —, amounting to $104.16; freight prepaid at fifteen-cent rate to Wyandotte. All these shipments are late-cut hay.

87 August 3d, 1889, Geo. Neymeyer & Co., Little Rock, Ark., St. L. & I. M. car 3590; 285 bales; weight, 19,950 pounds, at $6.60 per ton, $65.80; less freight, $16.00; leaving amount net, $49.84, which was paid.

C. H. Dolbeer, Little Rock, Ark., August 23d, 1889, St. L. & I. M. car 7132; 263 bales hay, weight, 19,875 pounds, $6.60 per ton, $65.60; less freight, $17.36; net, $48.24.

J. B. Richards, Pine Bluff, Ark. I will state in connection with the shipment of this car when it arrived at Pine Bluff, it was somewhat damaged and Mr. Richards made a claim on us. It was sold at $5 a ton. He received it at $4.75. September 3d, 1889, Mo. Pac., 7022; 279 bales, 19,450 pounds; $4.75 per ton; $46.20.

Gurdon Lumber Company, Gurdon, Ark., Sept. 6, M., K. & T. car 6306, 281 bales, 19,400 pounds, $5 per ton, $48.50.

Shibley-Wood Grocery Co. St. L. & I. M. car 2256, Sept. 19, 276 bales, 17,500 pounds, $5 per ton, $42.75.

Sept. 27, same parties, St. L. & I. M. car 8843, 273 bales, 18,975 pounds, $5 per ton, $47.32.

Smithton Lumber Co., Smithton, Ark., St. L. & I. M. car 8542, 264 bales, 17,110 pounds, $5 per ton, $42.77.

Whalen Lumber Co., Whalen Springs, Ark., I. M. & S. car 7774, 283 bales, 18,969 pounds, $5 per ton, $47.42.

Gurdon Lumber Co., Gurdon, Ark., Mo. Pac. car 2152, Oct. 14, 230 bales, 16,080 pounds, $5 per ton, $40.30. Shipped twelve cars to these parties, all at the same price.

Arkadelphia Lumber Co., Arkadelphia, Ark., Oct. 9, St. L. & I. M. car, 248 bales, 18,625 pounds, at $5 per ton, $46.56. Shipped these parties five cars at same prices.

Clarkston Christopher Lumber Co., St. Louis, Mo., shipped to Mason's Switch, Oct. 22, St. L. & I. M. car 8908, 21,086 pounds, $5 per ton, $54.35.

W. T. Kelly, Little Rock, Ark., Nov. 5, 1889, 269 bales, 20,140 pounds, $5 per ton, $50.35. Same date shipped them 269 bales, 19,660 pounds, $5 per ton, $49.15.

The entire contents of the book so heretofore offered in evidence are as follows:

S. Shulties, Hot Springs, Ark.

Car I. M. 8352.	Aug.	6. 294 bales hay, wt. 20,600, at $11 per ton, del'v'd	$113 33	
		Less freight	61 80	
				51 53
	Aug.	20. By cash		51 50
88	'89.			
M. P. 8751.	Sept.	7. 292 bales, 24,004, at $11 per ton.	$132 02	
		Less freight	60 00	
		Bill rend		72 02
	Oct.	5. By cash		72 00
St. L. I. M. 322.	Sept.	14. 295 bales, at., 18,177, at $11 per ton	$99 95	
		Less freight	55 50	
		Bill rend		44 45
	Sept.	26. By cash		44 45
M. P. car 7272.	Oct.	16. 271 bales hay, 19,535, $5		48 85
	Oct.	28. By cash		48 45
I. M. & S. car 9618.	Oct.	30. 369 bales, 19,880, $5	$49 70	
	Nov.	12. By cash		49 70

Desha Lumber & Planting Co., Arkansas City, Ark.

Car I. M. 2744.	Aug.	6. 221 bales hay, wt. 24,170, at $5 net	$60 43	
		Bill rend		
Mo. P. 12652.	Sept.	24. 260 bales, wt. 17,136 pounds, $5 ton		42 84
				103 27
	Oct.	12. By cash		103 27
M. P. car 5735.	Oct.	14. 254 bales hay, 18,410, at $5	$46 03	
	Nov.	1st. 256 bales, 20,110 pounds hay, $5.	50 28	
	Nov.	22. By cash		96 31

F. O. Voelter, Fort Smith, Ark.

I. M. car 7460.	Aug.	19. 290 bales hay, wt. 23,215 at $6.50	$75 44	
		Less freight	17 00	
		Bill rend'd		58 44
	Aug.	26. By cash		58 44

M. P. car 12927.	Aug.	24.	269 bales, wt. 19,087 at $6.50 per ton	62 03
			Less freight	20 00
			Bill rend'd	42 03
				2 91
	Aug.	31.	By cash	39 12
89				39 12
M. P. 7206.	Aug.	31.	275 bales hay, net, 18,554 at $5 per ton	46 40
	Aug.	9.	By cash	46 40
St. L. I. M. 8561.	Sept.	16.	238 bales, wt. 20,540, at $5 per ton	51 35
			By cash	50 56
			Less shortage allowed	79
I. M. & S. 9333.	'89.		274 bales, wt. 18,350, at $5 per ton.	$45 87
	Sept.	19.	By cash	44 15
			Claims shortage 690 lbs.	1 72

Border City Ice & Coal Co., Fort Smith, Ark.

	Aug.	19.	246 bales hay, wt. 21,565 lbs. at $7 per ton	$95 44
			Less freight	17 00
			Bill rend'd	58 44
	Dec.	10.	By cash and ice	58 44

A. L. Shailer, Little Rock, Ark.

I. M. car 8561.	Aug.	21st.	266 bales hay, wt. 21,760, at $6.60 per ton	$71 81
			Less freight	24 98
				46 83
I. M. car 2100.			237 bales hay, weight 22,030, at $6.	72 70
			Less freight	27 13
				45 57
				92 40
	Sept.	10.	By cash	92 40

Owen & Bradshaw, Little Rock, Ark.

I. M. car 21.	Aug.	21.	286 bales hay, weight 20,030 lbs., at $6.75	67 60
			Less freight	24 70
			Bill rend.	42 90
			By cash	42 90
90 M. P. car.	Aug.	29.	271 bales hay, wt. 18,796 at $6.75.	64 03
			Less freight	16 00
			Bill rend.	48 03
	Sept.	26.	By cash	48 03
I. M. & S. 8419.	Sept.	25.	271 bales, wt. 18,075 lbs., $5 per ton	46 76
	Oct.	8.	By cash	46 76

T. H. Jones & Co., Little Rock.

I. M. car 8946.	Aug.	21.	280 bales hay, wt. 25,050 lbs., at $6.50 per ton. Less freight, bill rend. and draft.	82 67
I. M. car 8272.	Aug.	22.	270 bales hay, weight 21,600, at $6.50	71 28
			Less freight	
			Bill rend. and draft	
			By freight	21 75
				31 37
				53 12
	Oct.	14.	By cash	91 29

Hearne Lumber Company, Wyandotte, Ark.

Car 472.	Aug.	31.	433 bales hay, weight 26,040. Freight prepaid, $8.	104 16
	Aug.	31.	By bill rend., cash	104 16

Hearne Lumber Co.

M. P. car 4897.	Sept.	6.	212 bales, 18,844 lbs. Bill rend.	75 40
Mo. P. 6977.	Sept.	16.	260 bales, wt. 18,282, at $8 per ton, del'v'd. Freight prepaid.	873 12
				148 52
	Oct.	—.	By cash	142 09
			Error in weights	6 43

Geo. Nemeyer & Co., Little Rock.

St. L. & I. M.	Aug.	23.	285 bales hay, wt. 19,950, at $6.60..	$65 84
			Less freight.....	16 00
				49 84
			By cash.....	49 84
91				
Mo. P. 2363.	Sept.	24.	298 bales, wt. 17,115 lbs., $6.60..	$56 48
			Less freight.....	16 00
				40 48
	Oct.	3.	By cash.....	40 48
M. P. car 12998.	Oct.	14.	1 car hay, 18,945, a. $5.....	$47 29
			By cash.....	46 40
				89

C. H. Dolbeer, Little Rock, Ark.

St. L. & I. M. car 7132.	Aug.	23.	263 bales hay, wt. 18,873, a. $6.60 ton.....	$65 60
			Freight.....	17 36
				48 24
	Aug.	31.	By cash.....	48 24
St. L. & I. M. 7308.	Sept.	7.	268 bales, wt. 20,024, a. $6.60 ton.	$66 10
			Less freight.....	16 56
				49 54
	Sept.	26.	By cash.....	49 54
Mo. P. 7330.	Sept.	24.	276 bales, wt. 17,151, at $5 ton...	$42 87
	Oct.	5.	By cash.....	42 87
M. P. car 5358.	Oct.	16.	251 bales hay, 17,348, a. $5.....	$43 37
	Nov.	19.	By cash.....	35 54
				7 83

I. B. Richards, Pine Bluff, Ark.

M. P. 7022.	Sept.	3.	279 bales, 19,450, at $4.75.....	$46 20
	Sept.	14.	By cash.....	46 20

Gurdon Lumber Co., Gurdon, Ark.

M., K. & T. 6306.	Sept.	6.	281 bales, wt. 19,400, at $5 ton...	$48 50
	Sept.	16.	Bill rend. By cash.....	48 50
2714 I. M.	Sept.	16.	269 bales, wt. 20,983, at $5 per ton.....pd.	$52 45
Mo. P. 2390.	Sept.	17.	256 bales, wt. 23,495, at $5 ton, pd.	$58 73
			Less claim shortage.....	2 55
				108 63
	Sept.	26.	By cash.....	108 63

92

I. M. & S. 8222.	Sept.	24. 227 bales, wt. 22,595, at 85 ton, f. o. b.	$856 46
	Oct.	5. By cash	56 46
M. P. 7935.	Sept.	27. 289 bales, 18,925 lbs., a. 85	$847 32
	Oct.	5. By cash	47 32
M. P. 2404.	Oct.	2. 274 bales, 22,770 lbs., 85	$856 95
	Oct.	2. 309 bales, 21,750, 85	55 85
			112 53
	Oct.	4. By cash	112 53
M. P. car 8190.	Oct.	4. 286 bales, 21,086, 85	$852 75
	Nov.	14. By cash	52 72

F. L. Gossett, Little Rock, Ark.

I. M. & S. 9236.	Sept. 19'89.	236 bales, wt. 21,680, at 87 ton, del'v'd, freight prepaid	$875 88
	Nov.	13. By cash	60 65

Shibly-Wood Grocery Co., Van Buren, Ark.

Sept. 19.	276 bales, weight 17,100, at 85 ton	$842 75
	I. M. & S. 2236.	
Sept. 27.	272 bales, 18,975, at 85 ton	47 32
	St. L. & I. M. 8843.	
		$890 07

Smithton Lumber Co., Smithton, Ark.

Sept. 19, '89.	264 bales, wt. 17,110 lbs., at 85 ton	$842 77
	I. M. & S. 8542.	
Dec. 13.	By cash	42 77

Wheelen Lumber Co., Wheelen Springs, Ark.

Sept. 24.	283 bales, wt. 18,968 lbs., 85 ton	$847 42
	I. M. & S. 7774.	
Sept. 27.	260 bales, wt. 17,525, 85	43 28
	M. P.	
Sept. 27.	277 bales, 18,721 lbs., at 85	46 80
	M. P. 12902. Smithton car.	
Sept. 30.	268 bales, 19,149, 85	47 88
	M. P. car 12919.	
Sept. 30.	258 bales, 17,990, 85	44 98
	M. P. car 5531.	
		$230 90
93 Oct.	—. By cash	230 40
	Balance	50
Nov. 14.	320 bales, 20,205, 85	50 52
	M. P. car 8045.	
		51 02
Nov. 30, '89.	By cash	51 02

Gurdon Lumber Co., Gurdon, Ark.

Oct.	14.	230 bales hay, 16,080 lbs., at $5	$40 20
		M. P. car 2152.	
Nov.	14.	By cash	40 20
Oct.	14.	236 bales hay, 16,715 lbs., at $5	41 78
		S. B., C. I. & R. 5569.	
Nov.	14.	By cash	41 78
Oct.	16.	248 bales hay, 19,286 lbs., $5	48 22
		Car St. L. & I. M. 2390.	
Nov.	14.	By cash	48 22
Oct.	31.	283 bales, 21,970 lbs., at $5	54 92
		Car M. P. 7689.	
Nov.	14.	By cash	54 92
Nov.	1.	288 bales, 21,015, $5	52 54
		M. P. 7615.	
Nov.	14.	By cash	52 54
Nov.	5.	212 bales, 15,300, $5	38 25
		M. P. 4672.	
Nov.	14.	By cash	38 25
Nov.	5.	258 bales, 19,300, $5	48 25
		L. P. & G. I. 20644 car.	
Nov.	14.	By cash	48 25
Nov.	7.	257 bales, 18,190, $5	45 47
		I. M. car 9190.	
Dec.	10.	By cash	45 47
Nov.	9.	253 bales, 17,130 lbs., $5	43 28
		I. M. & S. car 8185.	
Dec.	10, '89.	By cash	43 28
Nov.	9.	266 bales, 19,060 lbs., $5	47 65
		M. P. 6934.	
Dec.	10, '89.	By cash	47 65
Nov.	11.	265 bales, 19,100 lbs., $5	47 75
		Car 12095, Mo. Pac.	
Dec.	10, '89.	By cash	47 75
Nov.	19.	231 bales, 16,010 lbs., $—	40 03
		I. M. & S. 2642.	
Dec.	10, '89.	By cash	40 03

94 J. R. Ward, Wagoner, I. T.

		19,875 net, at $5 ton	$49 68
		I. M. & S. 7762.	

Arkadelphia Lumber Co., Arkadelphia, Ark.

Shipped to Daleville, Ark.

Oct.	9.	248 bales hay, wt. 18,625 lbs., 85 ton	$46 56
		S. L., I. M. & S. car 7844.	
Oct.	8.	By cash	46 56
Oct.	15.	268 bales hay, 18,965 lbs., 85	47 42
		I. M. 8744 car.	
Oct.	26.	By cash	47 42
Oct.	16.	227 bales hay, 16,302 lbs., 85	40 75
		Car St. L. & I. M. 4202.	
Oct.	30.	By cash	40 75
Oct.	25.	277 bales hay, 22,025 lbs., at 85	55 06
		St. L., I. M. & S. 3626.	
Nov.	2, '89.	By cash	55 06
Nov.	12.	229 bales, 18,430 lbs., 85	$46 08
		M. P. car 12066.	
Dec.	10.	By cash	46 08

Clarkston Christopher Lumber Co., St. Louis, Mo.

Mason's Switch.

Oct.	22.	1 car hay, 21,086 lbs., at 88	$84 33
		I. M. & S. car 8906.	
		By cash prepaid on hay	30 00
			54 33
Nov.	22.	1 car M. P. Hay, 17,160 lbs., 85	$42 90
		1 car I. M. 3044. Hay, 19,630 lbs., 85	49 08
		Freight prepaid on same	30 00
		Paid on car lumber	63 98
Aug.	9.	By 1 car lumber	$240 31
		Bal. due us	1 97

W. T. Kelly, Little Rock, Ark., sup't A. V. R'y.

Nov.	5.	269 bales, 20,145 lbs., 85	$50 35
		I. M. & S. car 8978.	
Nov.	5.	269 bales, 19,669, 85	49 15
			99 50
Feb.	21.	By cash	$99 50

95 Q. 45. Do you know where this hay was cut and put up?
A. Yes, sir.
Q. 46. Where?
A. In the vicinity of Wagoner.
Q. 47. Do you know whether it was early or late cut hay.

A. It was shipped as late-cut hay.

Q. 47½. All of it?

A. I judge so; yes, sir. The price was made on late-cut hay. I represented it to be late-cut hay to the parties to whom I sold it.

Q. 48. What kind of hay was this; prairie hay?

A. Yes, sir; prairie hay; cut on the prairie.

Q. 49. In your statement of the market price, do you mean that was for prairie hay?

A. Yes, sir; for prairie hay.

Q. 50. I understood you to say in your direct examination that you were not there when this hay was burned?

A. No, sir; I was not.

Cross-examination by Mr. JACKSON:

Q. 1. In your shipments of hay you speak of one to S. Shultics, Hot Springs, Ark., Aug. 6th, 20,600 pounds, at $11 per ton.

A. Yes, sir.

Q. 2. Is that f. o. b. at Wagoner?

A. No, sir; free on board at Hot Springs.

Q. 3. Will you tell the jury, if you know, whether that particular batch of hay was early or late cut hay?

A. I can tell you what I know about it. I sold the hay on the representation of my foreman as late-cut hay.

Q. 4. You don't know yourself whether it was early or late?

A. I do not. That was the price I sold it for.

Q. 5. You don't know yourself, as I understand you?

A. No, sir; I didn't see the hay.

Q. 6. Now, this item of hay which you have mentioned as having been sold to the Desha Lumber and Planting Co., at Arkansas City, Ark., 221 bales, shipped August 6th, price $5 per ton, just tell the jury what you mean by that?

A. Net on board cars.

Q. 7. That was the hay on the cars at Wagoner?

A. Yes, sir.

Q. 8. Included all the expenses of putting it up there?

A. Yes, sir.

Q. 9. That hay shipped August 6th, can you tell the jury of your own knowledge whether that was early or late cut hay?

A. No, sir; I think it was hay taken from the swath. I think Mr. Johnson commenced cutting at that time. I was not present and did not see the hay cut.

Q. 10. This hay shipped F. O. Voelter, Ft. Smith, Ark., Aug. 19, 1889, 290 bales at $6.50. Please explain to the jury what that means.

96 A. It means delivered on board cars at Fort Smith.

Q. 11. Can you state to the jury whether that particular batch of hay was early or late cut hay of your own knowledge?

A. I sold it for late-cut hay.

Q. 12. Is that the only hay that you sold to Voelter that year?

A. No, sir; it is not.

Q. 13. Have you an item of other hay sold to him in this book?

A. Yes, sir.

Q. 14. Will you turn to it? You have another item of hay sold to him on Aug. 24th, 269 bales at 86.50 per ton. What was that price?

A. Delivered at Fort Smith.

Q. 15. Do you know, of your own knowledge, as to whether that particular item of hay was early or late cut hay?

A. I do not.

Q. 16. What did you sell it for?

A. Late-cut hay.

Q. 17. Then on August 31st you have an item of hay as having been sold to Voelter, 275 bales at 85 per ton. What would that indicate?

A. Free on board cars at Wagoner.

Q. 18. September 16th is your next sale to Mr. Voelter?

A. Yes, sir.

Q. 19. Of 238 bales at 85 per ton. Please state what that price indicates.

A. Free on board cars at Wagoner.

Q. 20. On September 19th you have another item of hay sold to Voelter, 274 bales at 85 a ton. What does that price indicate?

A. Free on board at Wagoner.

Q. 21. Do those particular items indicate all the hay sold by you during the year 1889 to Mr. Voelter at Ft. Smith?

Ans. Yes, sir.

Q. 22. Can you state to the jury what you represented the hay to be to Mr. Voelter, early or late hay?

A. Late-cut hay. We tried to contract for early-cut hay. Mr. Johnson said they were baling on the east side of the track. They wanted to bale up that hay before they reached the early-cut hay. Before the baler reached it this fire took place. I wrote to Mr. Voelter that we would send him the best hay we could at 85 a ton, delivered at Wagoner. I did not ship any early-cut hay to him that season. I made him a price on early-cut hay, but did not make any shipment.

Q. 25. Whatever transaction there was between you and Mr. Voelter, you had it?

A. Yes, sir; in selling it.

Q. 26. That was the only transaction you had with him?

A. Yes, sir.

Q. 27. Is any of the hay shown by this book, about which you have testified to have been sold in the year 1889, early-cut hay?

97 A. I think the car shipped the Border City Ice & Coal Co. was early-cut hay; one small stack.

Q. 28. Can you turn to that; this item of hay sold to the Border City Ice & Coal Co. of Ft. Smith, on Aug. 19th, 1890, 246 bales of hay at 87 a ton, you think is early-cut hay?

A. That is my impression.

Q. 29. What does the 87 a ton mean?

A. Delivered at Fort Smith.

Q. 30. Is there any other item of hay sold in the year 1889, as indicated in this book, save this item as above, early-cut hay?

A. No, sir; not to my knowledge.

Q. 31. Where was this hay cut from?

A. The vicinity of Wagoner.

Q. 32. Was it from grass that was grazed upon by cattle during the year, or was it from enclosed fields?

A. It was out on the prairie, sir.

Q. 33. Cattle did graze upon it—roaming over the public domain?

A. If cattle had grazed upon it, there would not have been any hay to cut.

Q. 34. Was it out on the open lands near Wagoner?

A. Yes, sir.

Q. 35. Where cattle were free to g-aze upon it?

A. Yes, sir.

Q. 36. Was this hay that was burned north or south of Wagoner?

A. Well, sir, I never saw it; I never visited the burned district.

Q. 37. Have you never visited the burned district since?

A. I never have; no, sir.

Q. 38. Can you tell the jury how many ricks of hay were put up in the year 1889, in the vicinity of Wagoner?

A. I cannot, sir.

Q. 39. Didn't you tell the jury there were thirty-two ricks?

A. Mr. Johnson reported to me thirty-two ricks before the fire. He put up a good deal after the fire. He reported to me, but I did not keep any account of the ricks. I kept an account of what was shipped.

Q. 40. Then prior to the time of the fire thirty-two ricks, as far as you have any knowledge, was all that was ricked during that season?

A. That was what he reported to me.

Q. 41. Do you know, of your own knowledge, when Mr. Johnson and your people there, working for you, commenced baling hay from the swath?

A. It was some time in the latter part of July or the early part of August. I didn't pay much attention. That is my judgment.

Witness discharged.

98* Plaintiffs rest.

Court was now adjourned until two o'clock p. m. of this day, at which time the trial of this cause was resumed, as follows:

Counsel for defendants now moves the court to strike out all the testimony in this case offered and introduced on the part of the plaintiffs to this time, for the reason that defendants claim that there is an absolute and fatal variance between the evidence and the complaint.

The Court: Unless the plaintiffs knew the number of the engine there was no necessity to name it. The question in the case is whether an engine burned the hay. But the plaintiffs having alleged a certain engine, naming the engine, I think the defendants

had a right to prepare to defend against that engine. As counsel states that he is willing to make affidavit to that effect, I will allow him to do so and let the cause be continued and allow you to amend.

Whereupon counsel for defendants asked to be permitted to withdraw from the court-room in order to prepare a written motion to strike out plaintiffs' testimony and affidavits in support of such motion, as directed by the court, and shortly thereafter, such leave having been granted by the court, defendants again appeared in open court and filed said written motion together with the affidavits of Clifford L. Jackson and William H. Brehm.

Whereupon plaintiffs' counsel asked to be further heard against said motion, and, pending such argument, defendants' counsel asked leave to amend such motion by adding thereto a second ground, which leave was granted by the court and said amendment accordingly made.

Which said motion, together with the affidavits of Clifford L. Jackson and William Brehm, in support thereof, are in words and figures as follows, to wit:

"In the United States Court in the Indian Territory, First Judicial Division, May Term, A. D. 1891.

BEN. F. LAFAYETTE and SALLY M. HAILEY, Plaintiffs,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas & Texas Railway, Defendants.

Motion to Strike Out Testimony of Plaintiffs.

Now at this day come the above-named defendants in the above-entitled cause, and move this honorable court to withdraw from the jury all evidence in this case offered by the plaintiffs and now before the jury, and for grounds of said motion say:

99 First. That there is a material variance between the said proof and the allegations in the plaintiffs' complaint in this, that said complaint alleges that said engine No. 63, mentioned in said complaint, set out the fire complained of in plaintiffs' complaint, and occasioned the damage for which plaintiffs now sue, whereas the evidence in this case does not show that said engine No. 63, mentioned in plaintiffs' complaint, was the engine which set out the fire that occasioned the damage of which plaintiffs in their complaint complain. And that because of such variance between plaintiffs' complaint and plaintiffs' evidence in this cause these defendants are greatly misled and surprised, and are unable to meet the state of facts made by plaintiffs' proof in this case; but respectfully show to the court that they are able to meet the state of facts made by plaintiffs' complaint, and are prepared at this time to go on with said trial if plaintiffs be required to prove the facts as alleged in their said complaint.

Second. That plaintiffs have wholly failed to prove the allegation

in their complaint contained in this, that they have not shown that engine No. 63 was the engine that set out the fire complained of as having occasioned the destruction of plaintiffs' hay.

And in support of this said motion, defendants now file affidavits of Clifford L. Jackson, their attorney in this case, and of William H. Brehm, one of their witnesses in this case.

CLIFFORD L. JACKSON,
Attorney for Defendants."

Indorsed: "No. 765. Ben. F. Lafayette and Sally M. Hailey *vs.* Geo. A. Eddy and H. C. Cross, receivers Missouri, Kansas & Texas railway. Motion to strike out evidence of plaintiff. Filed June 26th, 1891. Wm. Nelson, clerk. C. L. Jackson, attorney for defendants."

Affidavit of C. L. Jackson.

UNITED STATES OF AMERICA:

Indian Territory, First Judicial Division.

In the United States Court in the Indian Territory, First Judicial Division, May Term, 1891.

BEN. F. LAFAYETTE and SALLIE M. HAILEY, Complainants,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway, Defendants.

Clifford L. Jackson, of lawful age, first being duly sworn, upon his oath states: That he is the attorney of record for the defendants in the above-entitled cause; that he has been the only attor-
100 ney employed by said defendants to manage said cause from the time of the institution of this suit to the present time; that in preparing the defense in this case he relied upon the allegation in plaintiffs' complaint that the engine which set out the fire complained of was engine No. 63, belonging to and in possession of said receivers in their management and operation of the Missouri, Kansas & Texas railway; that this affiant, in the preparation of the defense for the above-named defendants in this cause, made inquiries of the proper agents, servants and employés of the above-named defendants, and was informed and states that he is now able to show to this honorable court that said receivers on said 20th and 30th days of August, A. D. 1889, owned and possessed an engine No. 63, as described in plaintiffs' complaint, and only one such engine bearing such number 63, and that such engine No. 63 on the 30th day of August, A. D. 1889, was in the shops of said receivers at the town of Parsons, in the State of Kansas, undergoing repairs; that after the depositions of witnesses taken in this cause and read to the jury as a part of the plaintiffs' evidence in this cause, were taken, this affiant made further inquiry of the proper agents, servants and employés of said receivers, and was informed and states

now to the court that he is prepared to prove in this cause and at this time that such engine No. 63 was in the shops at the town of Parsons, in the State of Kansas, on the said 20th day of August, A. D. 1889, undergoing repairs, and that on each of said days, to wit, the 20th day of August and the 30th day of August, A. D. 1889, said engine No. 63, described as aforesaid in plaintiffs' complaint as the engine which set out the fire that destroyed plaintiffs' hay, was in said machine shop at Parsons, Kansas, undergoing repairs as aforesaid, and was not within the Indian Territory upon either of said days; that this affiant was also informed from papers placed in his possession by the claim department of defendants' railway that said plaintiffs relied upon the allegations made in their complaint that said engine No. 63 was the engine that set out such fire, and that said plaintiffs would so attempt to prove upon the trial of this cause, and that no other engine than said engine No. 63 did set out such fire; that this affiant now shows to the court that such information was given to said claim department by these plaintiffs for the purpose of identifying the particular engine that set out the fire in question, and believing it to be the law that said plaintiffs were required in good faith to so set out in their complaint, as they have done, that said engine No. 63 was the engine that set out such fire, this affiant, as attorney for these defendants, relied upon the same, and has prepared the defense in this case in order to meet such allegations as to such particular engine, and is not prepared to defend this cause should the court permit these plaintiffs to prove that any other engine set out such fire, or to amend their complaint by alleging some other engine than said engine No. 63 set out such fire.

101 This affiant states to the court that he, as attorney for said defendants, and the only attorney in charge of their cause, and the defendants themselves, have been misled by the variance between the allegation in plaintiffs' complaint that engine No. 63 set out the fire in question, and plaintiffs' proof in this cause which does not show what engine, if any, set out the fire in question; that affiant, as such attorney, and the defendants in this cause, are surprised at such variance between plaintiffs' complaint and plaintiffs' proof in this cause, and state to the court that they cannot prepare, at the present term of this court, to defend this cause against the proof of plaintiffs in this cause, unless plaintiffs are required to prove, as part of their case, that said engine No. 63 did actually set out the fire in question.

CLIFFORD L. JACKSON.

Subscribed and sworn to before me this 26th day of June, A. D. 1891.

WM. NELSON, *Clerk*,
By W. R. SHACKELFORD, *Deputy*.

Indorsed: "No. 765. U. S. court in Indian Territory, first judicial division. Ben. F. Lafayette *et al. vs.* Geo. A. Eddy and Harrison C. Cross as receivers of the M., K. & T. R'y. Affidavit of Clifford L. Jackson. Filed June 26, 1891. Wm. Nelson, clerk."

Affidavit of William H. Brehm.

UNITED STATES OF AMERICA, *ss:*

Indian Territory, First Judicial Division.

In the United States Court in the Indian Territory, First Judicial Division, May Term, A. D. 1891.

BEN. F. LAFAYETTE and SALLY M. HAILEY, Plaintiffs,
vs.
GEO. A. EDDY and H. C. CROSS, as Receivers of the Missouri, Kansas and Texas R'y, Defendants.

Affidavit of Wm. H. Brehm.

William H. Brehm, of lawful age, first having been duly sworn, upon his oath states:

That he is now in attendance upon this honorable court as a witness for defendants in the above-entitled cause; that at the present time and during the entire month of August, A. D. 1889, and ever since last-mentioned month, this affiant has been in the employ of the above-named defendants as general foreman of the ma-
102 chine shops of said defendants at the town of Parsons, in the State of Kansas. This affiant can testify in this case, and will, if called, as a witness, testify in this case, that on the 20th day of August, A. D. 1889, there was but one engine running between the towns of Parsons, Kansas, and Muscogee, Indian Territory, known as engine number 63 and bearing said number 63.

And that on said 20th day of August, A. D. 1889, said engine number 63 was in said machine shops at Parsons, Kansas, under charge and in the custody of this affiant undergoing repairs.

And that upon said 20th day of August, A. D. 1889, said engine was not within the Indian Territory; that this affiant has no information or knowledge as to what engine or engines ran over the M., K. & T. R'y between the towns of Parsons, Kansas, and Muscogee, Indian Territory, on the 20th day of August, A. D. 1889; that it is not a part of the duty of this affiant as such general foreman, as aforesaid, and it was not his duty upon the 20th day of August, A. D. 1889, to know or to learn what engine ran over the Missouri, Kansas and Texas railway between the towns of Parsons, Kansas, and Muscogee, Indian Territory, on the said 20th day of August, A. D. 1889.

WILLIAM H. BREHM.

Subscribed and sworn to before me this 26th day of June, A. D. 1891.

—— ——, *Clerk.*

Indorsed: "No. 765. United States court, Indian Territory, first judicial division. Ben. F. Lafayette *et al. vs.* Geo. A. Eddy and H. C. Cross, as receivers of the M., K. & T. R'y. Affidavit of Wm. H. Brehm. Filed June 26, 1890. Wm. Nelson, clerk."

Upon the close of argument of counsel for plaintiffs court was adjourned until Saturday, June 27th, 1891, at nine o'clock a. m., at which time this cause being again taken up for hearing, the court heard further argument upon defendants' motion to strike out plaintiffs' testimony, at the close of which the court overruled said motion.

To which action of the court in so overruling said motion defendants, by their counsel, then and there duly excepted and still except.

Whereupon counsel for plaintiffs asked leave to amend their complaint by striking out the words "No. 63," being the words indicating the particular engine which set out the fire in question.

To the granting of which leave counsel for defendants objected.

Which objection was by the court overruled and said leave to so amend plaintiffs' complaint was granted, to which action of the court in so overruling defendants' said objection and in so
103 granting plaintiffs' said leave to so amend said complaint defendants, by their counsel, then and there at the time duly excepted and still except.

Whereupon, in accordance with such ruling of the court, counsel for plaintiffs amended said complaint by so striking out the words "No. 63."

Whereupon, defendants' counsel asks the court to postpone this case for such reasonable time as will enable counsel for defendants to prepare to meet the allegations of plaintiffs' complaint as they stand after such amendment having been made, and for ground of such motion states to the court that defendants and their counsel are greatly surprised by such amendment and have been misled by plaintiffs and induced by both the statements of plaintiffs themselves and plaintiffs' attorneys, made in writing to the claim department of defendants' railway, which said written statements are now shown to the court and are in words and figures as follows: (Here copy said written statement.)

WAGONER, I. T., *August 21st*, 1889.

H. R. Redmond, claim agent M., K. & T. R. R., Sedalia, Missouri.

DEAR SIR: On August the 26th, 1889, at about 2 p. m., engine 63 of your road (M., K. & T.) set fire and burned 15 large ricks of our very best hay, all July cutting; the stacks will average 50 tons to the stack—the ones burned.

The fire originated just a few feet from the ties, in full view of your sectionmen. Both the men at one hay press, also the men on the field, made every effort to check the fire, but owing to the high wind they could not stop it.

Please give this matter your very earliest convenient attention, as a speedy adjustment of this claim will oblige.

Yours, resp'ty, BEN. F. LAFAYETTE,
Fort Gibson, I. T.

AUGUST 31ST, 1889.

M. — Missouri, Kansas & Texas Railroad Co. to Ben. G. Lafayette, Dr.

750 tons hay, burned, at $4.00 per ton..... $3,000 00

Burned at Wagoner on 20th day of August, by fire from engine No. 63, of or belonging to said R. R.

As well as by the allegations of plaintiffs' complaint before amendment in this: That plaintiffs in their complaint alleged that
104 engine No. 63 set *fire* out the fire in question; that plaintiffs and their attorneys by such written statements made to defendants' claim department stated positively that engine No. 63 did set out such fire; that these defendants prepared to defend this cause with a view of meeting such allegation and proof thereof, and that they are now prepared to try the cause if plaintiffs are confined to the case as heretofore made by them in their complaint, but that if they are not held to proof of the fact that engine No. 63 set out the fire, and are permitted to amend their complaint and prove some other engine, that these defendants are not ready at this time to proceed with this cause, but that they can get ready and secure the proof necessary to proceed with this cause if they are given a continuance of this cause for such reasonable time as may be necessary in order to enable them to procure such proof; and in support of this motion for postponement or continuance of this cause defendants file the affidavit of their attorney, Clifford L. Jackson, and also the affidavit of one William H. Brehm, which said affidavits are in words and figures as follows: (Clerk here copy said affidavits.)

UNITED STATES OF AMERICA, } ss:
First Judicial Division, }

In the United States Court in the Indian Territory, First Judicial Division, May Term, A. D. 1891.

BEN. F. LAFAYETTE and SALLIE M. HAILEY, Complainants,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas & Texas Railway, Defendants.

Clifford L. Jackson, of lawful age, first being duly sworn, upon his oath states that he is the attorney of record for the defendants in the above-entitled cause; that he has been the only attorney employed by said defendants to manage said cause from the time of the institution of this suit to the present time; that in preparing the defense in this case he relied upon the allegation in plaintiffs' complaint that the engine which set out the fire complained of was engine No. 63, belonging to and in the possession of said receivers in their management and operation of the Missouri, Kansas and Texas railway; that this affiant in the preparation of the defense for the above-named defendants for this cause made inquiries of the proper

agents, servants and employés of the above-named defendants and was informed and states that he is now able to show to this honorable court that said receivers on said 29th and 30th days of August, 1889, owned and possessed an engine No. 63, as described in plaintiffs' complaint, and only one such engine bearing such number 63, and that such engine number 63 on the 30th
105 day of August, 1889, was in the shops of said receivers at the town of Parsons, in the State of Kansas, undergoing repairs; that after the deposition- of the witnesses taken in this cause and read to the jury as a part of the plaintiffs' evidence in this cause were taken this affiant made further inquiry of the proper agents, servants and employés of said receivers, and was informed and states now to the court that he is prepared to prove in this cause, and at this time, that such engine, No. 63, was in the shops at the town of Parsons, in the State of Kansas, on the said 29th day of August, A. D. 1889,' undergoing repairs; and that on each of said days, to wit, the 29th day of August and the 30th day of August, A. D. 1889, said engine No. 63, described as aforesaid in plaintiffs' complaint as the engine which set out the fire that destroyed plaintiffs' hay, was in said machine shops at Parsons, Kansas, undergoing repairs as aforesaid, and was not within the Indian Territory upon either of said days; that this affiant was also informed from papers placed in his possession by the claim department of defendants' railway that said plaintiffs relied upon the allegations made in their complaint that said engine No. 63 was the engine that set out such fire, and that said plaintiffs would so attempt to prove upon the trial of this cause, and that no other engine than said engine No. 63 did set out such fire; that this affiant now shows to the court that such information was given to said claim department by these plaintiffs for the purpose of identifying the particular engine that set out the fire in question, and believing it to be the law that said plaintiffs were required in good faith to so set out in their complaint, as they have done, that said engine No. 63 was the engine that set out such fire, this affiant, as attorney for these defendants, relied upon the same, and has prepared the defense in this case in order to meet such allegations as to such particular engine, and is not prepared to defend this cause should the court permit these plaintiffs to prove that any other engine set out such fire or to amend their complaint by alleging that some other engine than engine No. 63 set out such fire, or by striking out the words "No. 63."

This affiant states to the court that he, as attorney for said defendants, and the only attorney in charge of their cause, and the defendants themselves, have been misled by the variance between the allegation in plaintiffs' complaint that engine No. 63 set out the fire in question and plaintiffs' proof in this cause which does not show what engine, if any, set out the fire in question; that affiant, as such attorney, and the defendants in this cause, are surprised at the amendment now offered to be made and made in plaintiffs' complaint, and state to the court that they cannot prepare, at the present term of this court, to defend this cause against the allega-

tions of plaintiffs' complaint as now amended for the reason
106 that defendant cannot within the present term of this court procure evidence necessary to their defense under the newly amended complaint to prove what particular engine or engines passed over defendants' railroad in the vicinity of the fire in question and on the day in question, and the condition of each of said engines and the management thereof, and that affiant believes and shows to this court that such evidence can be procured if a continuance of this cause be granted, and affiant believes that if a continuance of this cause be granted that by the next term of this court these defendants will be enabled to prove such a statement of facts as will be a complete defense to the allegations now appearing in plaintiffs' amended complaint. Affiant further stated that had plaintiffs not been permitted to amend their complaint in this cause after the commencement of the trial of this cause, that defendant would have proved such a state of facts as would have been a complete defense to the allegations of plaintiffs' complaint.

CLIFFORD L. JACKSON.

Subscribed and sworn to before me this 27th day of June, A. D. 1891.

WM. NELSON, *Clerk.*

Indorsed: "No. 765. U. S. court in the Indian Territory, first judicial division, May term, A. D. 1891. Ben. F. Lafayette *et al. vs.* Geo. A. Eddy and H. C. Cross, receivers Missouri, Kansas & Texas railway. Affidavit of Clifford L. Jackson. Filed June 27, 1891. Wm. Nelson, clerk.

UNITED STATES OF AMERICA, *ss:*

Indian Territory, First Judicial Division.

I, William Nelson, clerk of the United States court in the Indian Territory, do hereby certify that the above and foregoing is a true, full and complete copy of the original affidavit filed in my office on the 27th day of June, 1891, by counsel for Geo. A. Eddy and H. C. Cross, receivers, defendants in the case of Sallie M. Hailey and Ben. F. Lafayette *vs.* said Eddy and Cross as such receivers, being cause No. 765 in the docket of the United States court in the Indian Territory, first judicial division, and that such affidavit was so filed by said counsel in support of a motion for a continuance or a postponement of said cause whilst the same was on trial in the court of which I am clerk. And I do further certify that in preparing a transcript of the record in said cause in compliance with a writ of error issued out of the United States circuit court of appeals for the eighth circuit, that the original affidavit, of which the above and foregoing is a copy, was omitted from said transcript, and in lieu thereof an affidavit of the same person filed on the 26th day of June, 1891, in support of a motion to strike out plaintiffs' testimony was copied into said transcript of said record.

107 In witness whereof I have hereunto set my hand and affixed the seal of said court this 12th day of November, 1891.

[Seal of the United States Court, Indian Territory.]

WM. NELSON,
Clerk of the United States Court in the Indian Territory.

Affidavit of William H. Brehm.

UNITED STATES OF AMERICA, *ss:*

Indian Territory, First Judicial Division.

In the United States Court for the Indian Territory, First Judicial Division, May Term, A. D. 1891.

BEN. F. LAFAYETTE and SALLIE M. HAILEY, Plaintiffs,
vs.
GEO. A. EDDY and H. C. CROSS, as Receivers of the Missouri, Kansas and Texas Railway, Defendants.

Affidavit of William H. Brehm.

William H. Brehm, of lawful age, first having been duly sworn, on his oath states:

That he is now in attendance upon this honorable court at a witness for defendant in the above-entitled cause. That at the present time, and during the entire month of August, A. D. 1889, and ever since last-mentioned month, this affiant has been in the employ of the above-named defendants as general foreman of the machine shops of said defendants at the town of Parsons, in the State of Kansas. This affiant can testify in this case, and will, if called as a witness, testify in this case that on the 20th day of August, A. D. 1889, there was but one engine running between the towns of Parsons, Kansas, and Muscogee, Indian Territory, known as engene number 63, and bearing said number 63.

And that on said 20th day of August, A. D. 1889, said engine number 63, was in said machine shops at Parsons, Kansas, under charge and in the custody of this affiant, undergoing repairs.

And that upon said 20th day of August, A. D. 1889, said engine was not within the Indian Territory. That this affiant has no information or knowledge as to what engine or engines ran over the M., K. & T. Ry between the towns of Parsons, Kansas, and Muscogee, Indian Territory, on the said 20th day of August, A. D. 1889. That it is not a part of the duty of this affiant, as such general foreman as aforesaid, and it was not his duty upon the 20th day of August, A. D. 1889, to know or to learn what engines ran

108 over the Missouri, Kansas & Texas railway between the towns of Parsons, Kansas, and Muscogee, Indian Territory, on the said 20th day of August, A. D. 1889.

WILLIAM H. BREHM.

Subscribed and sworn to before me this 20th day of June, A. D. 1889.

—— ——, *Clerk.*

Indorsed: "No. 765. U. S. court in Indian Territory, first judicial division. Ben. F. Lafayette *et al. vs.* Geo. A. Eddy and H. C. Cross, as receivers of the M., K. & T. R'y. Affidavit of Wm. H. Brehm. Filed June 26, 1890. Wm. Nelson, clerk."

Which said motion or application of defendants to postpone or continue this cause was by the court overruled and denied; and to which action of the court in so overruling and denying the said motion and application for postponement and continuance of this cause defendants, by their counsel, then and there at the time duly excepted and still except.

Counsel for defendants at this time moves the court to withdraw from the jury and strike out from this cause the written contract dated May 24th, 1889, between Sallie M. Hailey and Ben. F. Lafayette, offered in evidence by plaintiffs, on the ground that the pleading alleges that the plaintiffs, Hailey and Lafayette, were jointly putting up * * * and had cut and put up large quantities of hay for sale, in the proceeds or profits of which sale they were to share in certain proportions," and the written contract shows that Sallie M. Hailey alone was cutting and putting up said hay, and because the same was not a legal contract, Sallie M. Hailey being a married woman and incapacitated to make such contract.

Which motion was by the court overruled.

To which action of the court in so overruling said motion defendants by their counsel then and there at the time duly excepted and still except.

Counsel for defendants also moved the court to withdraw from the jury and strike out from this cause all testimony offered by plaintiffs herein as to the hay in question that had been proved to have been burned, on the ground that there is a variance between the allegations of the plaintiffs' complaint as to the hay claimed to have been burned and the proof in this cause showing the hay that had been burned, in this: that the allegations in plaintiffs' complaint *is* that the hay claimed to have been burned was upon the premises of plaintiff, Sallie M. Hailey, and the proof is that the hay in question was upon the open land and public domain of the Creek nation.

Which motion was by the court overruled.

109 To which action of the court in so overruling said motion defendants, by their counsel, then and there at the time duly excepted and still except.

The testimony-in-chief on the part of the plaintiff being now closed, the following testimony was offered and introduced on the part of the defense:

Dr. C. B. KENNEDY, of lawful age, having first been duly sworn, testified as follows:

Examined by Mr. JACKSON:

Q. 1. Give your name to the jury.
A. C. B. Kennedy.
Q. 2. Where do you reside?
A. At Parsons, Kansas.
Q. 3. In what business, if any, are you at present engaged?
A. In the hay business.
Q. 4. How long have you been engaged in such business?
A. Since the summer of 1885.
Q. 5. Since the summer of 1885 and up to what time, and where have you been engaged in such business?
A. I have been in the Cherokee nation with the exception of the summer of 1889. In the summer of 1889, I put up hay at Mazee.
Q. 6. Where is Mazee; in what nation?
A. It is in the Creek nation.
Q. 7. How far from Wagoner, if you know?
A. I think about twelve miles; I am not positive about that.
Q. 8. In what direction?
A. North.
Q. 9. Were you familiar with the value of hay in the rick in the vicinity of Mazee and Wagoner during the summer of 1889?
A. Yes, sir.
Q. 10. Do you know what was the value of hay known as early hay in the summer of 1889, in the month of August and about the 20th of August, 1889, per ton in the rick?
A. Yes, sir.
Q. 11. What was the value of such hay at such time and place?
A. Running from $1.25 to $1.50 per ton, I think, was the value of hay.
Q. 12. Were you familiar at the time designated with the customary rule in the country in that vicinity for the measurement of hay in the rick—that is, as to how many cubic feet it would take to make a ton?
A. Yes, sir.
Q. 13. Was there such a custom in that country?
A. Yes, sir.
110 Q. 14. Please tell the jury what was the custom and how many feet under that custom it took to make a ton in hay just put up and in hay which had settled?
A. In speaking of "just put up," I don't know of any custom. The custom is to let it settle.
Q. 15. How long?
A. Forty to sixty days. Seven and a half cubic feet to the ton.
Q. 16. What experience, if any, have you had in reference to baling hay from the rick, have you had much of that?
A. Yes, sir; I have done a good deal of it.
Q. 17. What proportion of the hay in the rick, and during the

summer of 1889, were you able to bale, or would you call merchantable hay?

A. Well, I think that you would get out of a rick two-thirds or two-fifths into the car out of a rick that would be measured.

Q. 18. What would become of the other portion of the hay; what was its condition?

A. The other hay was generally left upon the ground.

Q. 19. Why?

A. Because it was worthless.

Cross-examination by Mr. ROGERS.

Q. 1. For whom were you putting up hay in the summer of 1889?

A. I was selling hay; had a contract with the railroad company.

Q. 2. What railroad company?

A. The M., K. & T. then. I do not know whether it was in the hands of the receivers. If not, it followed right along.

Q. 3. You had a hay contract with the M., K. & T.?

A. Yes, sir.

Q. 4. Had you had a contract with the M., K. & T. prior to that?

A. I had a contract with the Missouri Pacific; followed along with the M., K. & T. for the unexpired term. Since that time I have furnished the road with a great deal of hay and sold it at market terms. I have not contracted with them, but sell them the most of the hay now.

Q. 5. You stated a moment ago that in baling a rick of hay that about two-thirds or two-fifths was all that you could get of good hay out of a rick?

A. I meant two-thirds or three-fifths.

Q. 6. I would like to know if that is not a pretty broad margin?

A. It is a good deal. Some you might get out two-thirds; some not quite so much. As you bale the hay you have got to get good hay. There is a great deal of waste.

Q. 7. How did you buy this hay?

A. I bought this hay in the car.

111 Q. 8. You didn't buy it in the rick?

A. They ricked it, but my contract with this party was any hay that spoiled after baling was two-dollar hay.

Q. 9. Did you buy this hay yourself, or cut it and put it in the rick?

A. I bought it.

Q. 10. You didn't cut it and put into the rick?

A. No, sir.

Q. 11. So that one-third lost or the two-fifths lost was not your loss?

A. No, sir.

Q. 12. Is it not quite probable that if you had cut it and put it up in the rick, the loss would not have been so great as upon the other fellow?

A. No, sir.

Q. 13. You think that you would have thrown away one-third to two-fifths of the hay if you had been cutting and putting it up yourself?

A. Yes, sir.

Q. 14. Did you ever do a thing of the kind in your life?

A. Yes, sir.

Q. 15. How often?

A. For the last five or six years.

Q. 16. Have you been cutting and putting up your own hay?

A. Part of the time I have.

Q. 17. You state that you have been throwing away from one-third to two-fifths?

A. Yes, sir; I have thrown away one-half.

Q. 18. As a general rule, when cutting and putting up hay, is your loss as large as one-third to two-fifths?

A. I think it is.

Q. 19. You think, then, that you lose as much as the men who cut it and furnish it to you lose?

A. Yes, sir; if I handle it.

Q. 20. You say that in the summer of 1889 you were buying hay and furnishing to the railroad company?

A. Yes, sir.

Q. 21. Did you buy it on the cars?

A. Yes, sir.

Q. 22. What did you pay for it on the cars?

A. I paid $2 for that which was spoiled and $4.25 for good hay, on the cars.

Q. 23. Where did you deliver it?

A. Here and at Denison and at Parsons.

Q. 24. Did they ship it?

A. They paid the expense themselves.

Q. 25. You paid how much?

A. $4.25. I got for good hay $5 from the railroad company the year round.

112 Redirect examination by Mr. JACKSON:

Q. 1. Are you acquainted and were you acquainted in August, 1889, with the cost of bailing hay from the rick and loading it upon the cars in the vicinity of Wagoner?

A. Yes, sir.

Q. 2. Please tell the jury what was the cost of so handling it.

A. I would think the cost of bailing and hauling any distance would be two dollars to two and a quarter, bailing and putting on the train; sometimes $1.75.

Witness discharged.

E. N. RATCLIFF, of lawful age, having first been duly sworn on the part of the defendant-, testified as follows:

Examined by Mr. JACKSON:

Q. 1. Please give the jury your name.
A. E. N. Ratcliff.
Q. 2. Where do you reside?
A. I live at Vinita, Indian Territory.
Q. 3. What character of business have you been or were you in in the summer of 1889?
A. I was in the mercantile business.
Q. 4. Where?
A. At Vinita.
Q. 5. Were you in business alone or a member of a firm?
A. Member of a firm—Ratcliff & Co.
Q. 6. What experience, if any, have you had in handling hay in the Indian Territory?
A. Well, we have had considerable experience. We have been handling hay for about five or six years.
Q. 7. How far is Vinita from Wagoner, about?
A. I think it is forty-nine miles.
Q. 8. In the month of August, 1889, were you or not familiar with the value of hay in the rick in the vicinity of Vinita and Wagoner along the line of the railroad?
A. The question is, was I familiar with the price of hay in the summer of 1889?
A. Yes, sir; along the line of the railroad between Vinita and Wagoner.
A. At some points I was.
Q. 10. What was the value of early-cut hay in that month and about the 20th day of the month of August, 1889, per ton, in the rick in your opinion?
A. I suppose it would have been worth from $1.25 to $1.50.
113 Q. 11. Were you, or not, at that time, familiar with the customary rule in that section of country for the measurement of hay to determine how many tons were in a given rick?
A. Yes, sir.
Q. 12. Please tell the jury what was the rule and how many feet under that rule it took to make a ton.
A. Our rule, the rule customary around Vinita, is to take a cube seven and a half feet, after the hay has settled about thirty days, for a ton.
Q. 13. Do you know anything as to the rule for the measurement of hay before it has settled thirty days; soon after it is put up?
A. No, sir; I do not.
Q. 14. Are you familiar or not, with any custom, if there was such custom among the people in the vicinity of the places named and in the summer of 1889, with reference to protecting hay ricked upon the prairie from fire?
A. There is a custom; yes, sir.
Q. 15. Are you familiar with it?

A. Yes, sir.

Q. 16. What was such custom?

A. The custom is to what is termed "fire-guard" the hay in the stack; to burn a section of the grass all around the stack; say thirty feet, or whatever might be agreed upon between the parties.

Q. 17. Between what parties?

A. The parties contracting for the hay; that is supposed to be a sufficient width, so that the fire won't jump it.

Q. 18. Did you have any experience, and if so, what, in the manner of baling hay from the rick in the summer of 1889?

A. We had some hay baled in that year.

Q. 19. I will ask you to explain to the jury what proportion of the hay in the rick you were able to obtain from it as merchantable hay, and what proportion, if any, was lost?

Question objected to by counsel for plaintiffs as incompetent, irrelevant and immaterial.

Objection sustained by the court.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

Q. 20. Please state to the jury what you know, if anything, as to the proportion of hay that could be baled from ricks of hay put up in the early part of the season in the summer of 1889, in the vicinity of where we have been talking of, and baled about the middle of August, and what proportion of such hay, if any, was unfit for baling?

Question objected to by counsel for plaintiffs as incompetent, irrelevant and immaterial.

114 The COURT: See if the witness knows the usual average loss.

Objection sustained by the court.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

Q. 21. In the month of August, 1889, and in the vicinity of the places that have been named in your testimony, were you familiar with what proportion of hay generally could be baled from ricks put up in the early part of the season, and what proportion of such hay would be unfit for baling for market?

A. I cannot answer that.

Q. 22. You stated to the jury that it was customary to make a "fire-guard" around ricks on the prairie; how soon after such hay was cut was it customary to place such fire-guard around it?

A. The rule on that is, as soon as the grass on the prairie is dry enough to burn, as soon as danger of fire obtains.

Cross-examination by Mr. ROGERS:

Q. 1. That is the rule, as I understand you, between the contracting parties?

A. Yes, sir.

Q. 2. You bought some hay, you say, during that season?
A. Yes, sir.
Q. 3. What did you do with it?
A. We shipped it.
Q. 4. In large quantities—by car-loads?
A. We shipped it by the car-load.
Q. 5. Where to?
A. To various points.
Q. 6. Name them.
A. Saint Louis, Little Rock; I would not be positive about any of the points—it has been so long ago.
Q. 7. What did you get for the Little Rock hay?

Counsel for the defendants objects to the price elsewhere than at the place where the hay was burned.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

Q. 8. What did you get for your hay at Vinita on the Little Rock shipment?
A. I cannot remember particular prices for any particular car-load.
Q. 9. What did you get for early-cut hay?
A. I can tell you what hay costs and about what we got for it in bulk.
115 Q. 10. "About" is very indefinite, but still I will take it if I cannot get anything more.
A. It is about as near as I can come with any accuracy.
Q. 11. Well, state it.
A. We had hay baled and put in a barn at Big Cabin.
Q. 12. Where is that?
A. South of Vinita.
Q. 13. How far?
A. Eight miles—a switch of the M., K. & T. railway. We had put in this barn 125 tons of baled hay. That cost $3.00 a ton put into the barn—weighed into the barn. We sold it out by the car-load to different points. I could not mention any particular point to a certainty just now. We made a profit in hay.
Q. 14. How much?
A. It would average on the whole bulk probably a dollar and a half a ton.
Q. 15. How much did you get for the early-cut hay? Was this early or late cut hay that you speak of?
A. Part of it early and part late.
Q. 16. All mixed up together?
A. No, sir; not mixed; stored in the barn and put up in different places.
Q. 17. How much did you get for early-cut hay in excess of late-cut?
A. I couldn't remember; I expect about a dollar a ton.

Redirect examination by Mr. JACKSON:

Q. 1. As to this hay which you say was put in the barn at Big Cabin, what, if you know, was the cost of baling and hauling the hay and putting it in the barn?

A. Well, the price of baling the hay in the field, as this was baled, is about $1.50 per ton.

Q. 2. What did it cost to haul it from the field to the barn?

A. I couldn't tell that; I should suppose about twenty-five cents. I don't know how far they hauled it. About twenty-five cents.

Witness discharged.

D. L. DENNY, of lawful age, having first been duly sworn on the part of the defendants, testified as follows:

Examined by Mr. JACKSON:

Q. 1. Please give the jury your name.

A. D. L. Denny.

Q. 2. Where do you reside?

A. In the Cherokee nation, I. T.

116 Q. 3. How far do you reside from Wagoner, in the Creek nation?

A. Twenty-eight or thirty miles.

Q. 4. How long have you resided there?

A. Eighteen years.

Q. 5. What is your business, and what has it been during all that time?

A. Engaged in the stock business; farming.

Q. 6. What experience, if any, have you had, with reference to hay; putting it up, buying it and selling it, etc.? Have you been engaged in that business to any extent?

A. Yes, sir.

Q. 7. In the summer of 1889, and in August of that year, were you familiar with the market value, in the vicinity of where you lived, and of Wagoner and that section of country, of hay in the rick?

A. Yes, sir; I have had a good deal of hay put up.

Q. 8. Please state to the jury what was the value of hay put up in the early part of the season and ricked on the prairie in that vicinity, about the 20th of August, 1889.

A. I had it put up at one dollar a ton.

Q. 8½. What was its market value at that time?

A. One dollar a ton is what I had it put up for.

Q. 9. You purchased hay at that price—one dollar a ton?

A. Yes, sir.

Q. 10. Were you familiar with the custom that prevailed in that section of country, if any such custom did prevail, at that time, as to protecting hay on the prairie from fire?

A. Yes, sir.

Q. 11. Please tell the jury what was such custom at that time.

A. After the hay was put up I would always plow around the

hay, and after it got dry enough would burn around it to protect it from fire.

Q. 12. How soon after the ricks were put up was it customary to do the plowing and how soon to do the burning?

A. As soon as the rick was finished.

Q. 13. Was that the general custom in that section of the country?

A. Yes, sir.

Q. 14. Were you familiar with the custom or rule that prevailed in that section of country, if any such custom or rule did prevail, as to how many feet it took to make a ton of hay in the rick? Answer, yes or no.

A. Yes, sir.

Q. 15. Tell the jury what that rule was and how many feet it took.

A. After it settled twenty days, took seven and a half cubic feet to the ton, making 432 or 433 feet.

117 Q. 16. At that time and in that neighborhood or section of country, were you familiar with what amount of hay in the rick was in proper condition to be baled and what amount of it was generally lost in baling?

A. I can answer by what I baled myself; it would bale out about half what I paid for it in the stack; oftener less than half; I would sell it for so much.

Cross-examination by Mr. ROGERS:

Q. 1. What were you doing with what you didn't bale?

A. I didn't do anything.

Q. 2. Left it there as lost?

A. Yes, sir.

Q. 3. You speak of buying hay in the season of 1889; for what purpose did you buy it?

A. To feed.

Q. 4. You didn't buy it to ship?

A. I said I had hay put up for one dollar a ton.

Q. 5. You paid that much for doing it?

A. Yes, sir.

Q. 6. You put it up to feed?

A. Yes, sir.

Q. 7. You didn't put it up for shipping at all?

A. No, sir.

Q. 8. How far from the railroad was this work done?

A. From half a mile to a mile.

Q. 9. You put it up for your own purposes?

A. Yes, sir.

Q. 10. If you had any over you would bale and ship?

A. Yes, sir.

Q. 11. If not, you wouldn't ship it?

A. No, sir.

Q. 12. When did you ordinarily have the baling done?

A. In the spring of the year.

Q. 13. The spring following the summer it was put up?

A. Yes, sir.

Q. 14. It would stay in the rick from the time it was put up in the summer until the following spring, and what you had left you would put up and ship?

A. Yes, sir.

Q. 15. Are you Creek?

A. No, sir.

Q. 16. Cherokee?

A. Yes, sir.

Q. 17. Would you have this hay put up from your own land or Cherokee land?

A. Cherokee land, of course.

118 Q. 18. I didn't know but that you might have had it under fence or pasture?

A. No, sir.

Q. 19. Would this hay be protected that you speak of having baled from the stack in the spring—fenced up?

A. Oh, yes; there wouldn't be any left if I didn't.

Q. 20. That would depend upon how much cattle you had.

A. There would be no other cattle, if my own didn't eat it.

Q. 21. But you had it fenced?

A. Yes, sir.

Q. 22. Did you bale any hay at all for shipment during the early summer of 1889? I mean of the crop of 1889?

A. No, sir.

Q. 23. Would there be a difference in the loss of hay, say which was put up in the early summer and baled thirty days afterwards, and that put up in the early summer and baled the following spring? Would not the loss be much greater than if baled in thirty days after it was put up?

A. Yes, sir.

Q. 24. Very much greater?

A. Yes, sir.

Q. 25. Had you any experience during that year in baling hay that was cut early in the season and within thirty or forty days after it was cut?

A. No, sir.

Q. 26. Where did you ship the hay that you baled the following spring—the spring of 1890? You said you had hay put up for one dollar a ton in 1889. Where did you ship what you had left in the spring of 1890?

A. I didn't ship any.

Q. 27. Where did you sell it?

A. I sold it right there.

Q. 28. What did you get for it?

Question objected to by counsel for defendants as incompetent, irrelevant and immaterial.

Objection sustained by the court.

To which ruling of the court plaintiffs, by their counsel, at the time excepted and still except.

A. I sold it for two dollars a ton.

Answer withdrawn from the jury.

Q. 29. This hay that you put up in the spring or summer of 1889—you hired hands and had it put up for your own use?
A. No, sir; I just let the contract. I gave a dollar a ton and they furnished everything.
Q. 30. It was left on the prairie where they put it up in ricks.
119 A. Yes, sir.

(The COURT:)

Q. 31. You furnished everything?
A. No, sir; I furnished nothing. I let out the contract to have it put — for one dollar a ton.
Q. 32. When did the hay become yours after it was put up in the rick? How long afterwards?
A. The contract was that it was to settle thirty days before it was measured.
Q. 33. What time was it cut?
A. Commenced in July and cut until October.
Q. 34. How close did you say it was to the railway?
A. Well, it was from three hundred yards to a mile.

Witness discharged.

F. M. DAVIS, of lawful age, having first been duly sworn, on the part of the defendants, testified as follows:

Examined by Mr. JACKSON:

Q. 1. Where do you live?
A. At Wagoner.
Q. 2. What is your business?
A. General merchandising.
Q. 3. At Wagoner?
A. Yes, sir.
Q. 4. How long have you been in business at Wagoner?
A. A little over two years.
Q. 5. In the month of August, 1889, where were you in business?
A. At the same place.
Q. 6. In the same business?
A. Yes, sir.
Q. 7. At that time were you familiar with the value of hay in the rick and in that vicinity? This question must be answered yes or no.
A. In August?
Q. 8. Yes, sir.
A. No.

Q. 9. Were you familiar with the value of hay at any time in the vicinity of Wagoner in 1889?

A. I was, later—a month or so later.

Q. 10. Do you know whether or not in the month of August, 1889, there was a market value for baled hay in the vicinity of Wagoner?

A. I think there was, because there was more or less sold by the car-load all the while.

Q. 11. Do you think there was for hay in the rick there at that time?

120 A. I don't know that there was for hay in the rick. There was for baled hay.

Q. 12. Do you know what the value of baled hay was at Wagoner in the month of August, 1889?

A. I don't know that I do. I don't think I do.

Q. 13. How long have you lived in the vicinity of Wagoner?

A. A little over two years.

Q. 14. Where did you live prior to that?

A. At Neosho.

Q. 15. Do you know whether or not there was a custom or rule prevailing in the section of country around Wagoner in the summer of 1889, with reference to protecting hay ricked upon the prairie from fire?

A. I do.

Q. 16. I will ask you to state to the jury what was such custom?

A. It was plowing around the ricks and burning between the furrows. I know several parties that did it.

Q. 17. You say plowing around the ricks and burning between the furrows?

A. Yes, sir.

Q. 18. One circle larger than the other?

A. Yes, sir.

Q. 19. How wide a distance was generally left between the two furrows?

A. Twenty-five or thirty feet.

Q. 20. How soon after the hay is ricked is it the custom to so protect and guard the ricks?

A. Soon after it is ricked, as soon after it is ricked as it can be burned, is our rule always.

Q. 21. As soon as it can be burned?

A. Yes, sir.

Q. 22. How soon after the hay was ricked was it customary to do the plowing?

—. All the contracts I had any interest in—that is the custom as far as I was interested.

Q. 23. How soon was it customary to do the plowing?

A. Shortly after the hay is put up; as soon as it can be got to.

Q. 24. At the time indicated did you know of a rule or custom prevailing in your section as to the measurement of hay in the rick to determine how many tons was in the rick?

A. I did not, at the time; no, sir.

Q. 25. Do you know of that custom since?

A. Yes, sir.

Q. 26. I will ask you to state to the jury what the rule is. How do you measure the rick to determine how much is in it?

A. The rule that I work under——

Q. 27. The general rule.

121 A. Nearly every contractor has a different rule. I can only give the rule I worked under last year.

The COURT: That is no evidence.

Cross-examination by Mr. ROGERS:

Q. 1. You stated that they would plow two furrows around, one outside of the other?

A. Yes, sir.

Q. 2. As soon as it could be burned, they burned off between the two furrows?

A. Yes, sir.

Q. 3. Was that hay fixed in that way, hay that was to remain on the prairie, or was it hay to be baled for early shipment?

A. All that I know about was hay that was to remain.

Q. 4. Where parties were putting up hay and baling as rapidly as in condition to bale and ship away by car-loads, was there any custom in regard to plowing?

Question objected to by counsel for defendants as incompetent, irrelevant and immaterial. Objection overruled by the court; to which ruling of the court defendants, by their counsel, then and there excepted and still except.

A. I have known cases where it was done.

Q. 5. You don't know of any custom prevailing—general custom? I don't mean a single case. One swallow don't make a summer.

A. I think every person should use proper precaution; I know several cases where it was done.

The first part of the above answer excluded by the court as incompetent.

Q. 6. Is it a general custom?

A. I don't know whether it was a general custom or not. I knew some that did and some that did not.

The COURT: The fact of some people doing a thing and other people not doing it in the same neighborhood does not establish any custom.

The foregoing remark of the court objected to by counsel for defendants on the ground that counsel thinks that it tends to prejudice defendants' case, and for that reason excepts to same.

Witness discharged.

SAMUEL H. MAYES, of lawful age, having first been duly sworn, on the part of the defendants, testified as follows:

122 Examined by Mr. JACKSON:

Q. 1. Give the jury your full name?

A. Samuel H. Mayes.

Q. 2. Where do you reside?

A. I live near Pryor Creek station, Indian Territory.

Q. 3. How far do you live from the town of Wagoner, in the Creek nation?

A. About twenty-five miles.

Q. 4. How long have you lived there?

A. I have been living there, in that neighborhood, for about forty years.

Q. 5. What is your business and what has it been during that period of time?

A. Well, I have been in the stock business for the last sixteen years.

Q. 6. Any other business than merely handling stock?

A. Handling stock and feeding stock, farming, stock-raising generally.

Q. 7. In your business, have you become acquainted with the cutting, curing and putting up hay?

A. Yes, sir; I do more or less of that every year.

Q. 8. And in the vicinity of where you live and on the prairie there?

A. Yes, sir.

Q. 9. Are you acquainted with the rule and custom, if there is such rule and custom in your section of the country, as to the measurement of hay in the rick in order to determine how many tons are in any particular rick?

A. Yes, sir.

Q. 10. What is the rule? Tell the jury.

A. To allow seven and a half feet to the ton.

Q. 11. In what kind of hay?

A. Hay put up and settled thirty days. I believe that is the rule.

Q. 12. Of what character of hay are you speaking?

A. Prairie hay. We haven't much, if any, other kind of hay in that country.

Q. 13. Were you, or not, familiar with the market value of hay in the rick in the summer or month of August, 1889?

A. Well, for the hay I had put up in the summer of 1889 I paid $1.25 per ton. I believe that was the customary price of the country. I knew of some hay being sold after being put up in the stack to other parties at the same price.

Q. 14. Were you acquainted with the custom or rule that prevailed in that country, if there was any such custom or rule, as to putting fire-guards around ricks, or protecting ricks from fire on the prairie?

A. I don't know as there was any regular rule or custom about

that. Almost everybody, though, after receiving hay topped
123 it out and generally put fire-guards around it; plowed around it and burned on the space between the furrows.

Q. 15. Do you recollect seeing at any time during the summer of 1889 some hay that was put up in the vicinity of Wagoner; north of Wagoner and east of the M., K. & T. railway by Mr. Lafayette?

A. I saw hay put up there north of Wagoner. I did not know it was Mr. Lafayette's hay. I saw hay there; learned afterwards that it was his hay; I didn't know at that time whose hay it was.

Q. 16. Did, or not, that hay seem to be put up as the ordinary run of hay is put up in that country?

A. It looked like any other hay put up all over the country. I didn't pay much attention to it. It looked like any other hay, though.

Q. 17. What, if anything, do you know about the particular character of the rickers used in putting up hay in that vicinity, as to the height to which hay can be ricked?

A. With these stackers I believe they generally put the hay up about twenty-five feet high; that is, from the center up through to the top.

Q. 18. Where it is put up upon the *the* prairie in ricks, say it is thrown twenty-five feet high; in a period of thirty days how much will that hay ordinarily settle?

A. It will settle right smart if it has rain on it; but in dry weather the hay does not settle so much.

Q. 19. In dry weather, in your judgment, how much will hay settle, the rick twenty-five feet high in the first instance?

A. Would think it would settle from one-quarter to one-fifth, or about that. It generally settles very slowly, though, in the stack in dry weather, nothing like it would if it had rain on it.

Q. 20. In hay of that character is it customary to measure at seven and a half feet to the ton, or more than that?

A. Yes, sir; it is customary to measure at that.

Q. 21. In case of rain upon the hay, in your opinion, how much would a rick twenty-five feet high settle in thirty days?

A. I couldn't say exactly how much, but it seems to me that it would go down two-fifths. Put up a fresh stack of hay and it would go down very fast if rain comes on it. I wouldn't know, hardly, how to estimate it; it settles rapidly.

Q. 22. Where it has settled two-fifths is it given the same measurement as where it settles one-fifth in the same time?

A. Yes, sir; that is your loss or your gain, whichever it might be.

Q. 23. You take the chances on the weather.

A. Yes, sir.

Cross-examination by Mr. ROGERS:

Q. 1. You live some twenty-five miles from Wagoner. Am I right about that?

124 A. It is sixteen miles from Chouteau and eight miles to Pryor Creek.

Q. 2. You spoke of buying hay that season. Where was it you bought hay?

A. In the neighborhood of Pryor Creek.

Q. 3. Twenty-five miles from the railroad?

A. No, sir; right on the M., K. & T. railroad. I live east of the railroad seven miles and have a range about five miles west. I have had hay put up on both sides of the road. I live seven miles east of Pryor Creek station.

Q. 4. What did you have this hay put up for?

A. To feed stock.

Q. 5. You didn't have it put up for shipment at all?

A. No, sir.

Q. 6. You did not ship any hay in the year 1889?

A. No, sir.

Q. 7. How did you have this hay put up? Did you buy it or furnish the money and have hands put it up?

A. I had it put up under contract, $1.25 per ton, fifty tons in a place.

Q. 8. I believe that you stated that as soon as the hay was delivered to the man who contracted for it that the custom was, or at least it was generally done, to plow around the hay and burn off between the furrows?

A. There is no regular custom about that. People generally do that. It is owing to the contract.

Q. 9. Generally do what?

A. Plow around the hay and burn it off.

Q. 10. When?

A. No regular time. Some years it will burn right when it is put up. In a dry year I have seen grass burn while they were cutting. In other years it won't burn at all.

Q. 11. Do you know what the custom is where people are baling as rapidly as it can be cut and baled?

Question objected to by counsel for defendants as incompetent, irrelevant and immaterial.

Objection overruled by the court.

No answer.

Q. 12. Do you know what the custom is where people are cutting it and shipping as rapidly as possible?

A. I don't know what the custom is. I don't know of any custom.

Court was now adjourned until Saturday, June 27th, 1891, at two o'clock, p. m., at which time the trial of this cause was resumed as follows:

125 C. W. TURNER, of lawful age, having first been duly sworn on the part of the defendants, testified as follows:

Examined by Mr. JACKSON:

Q. 1. Where do you reside?

A. At Muscogee.

Q. 2. In what business are you engaged?

A. Hardware and cattle business.

Q. 3. Do you do any ranching—farming?

A. Yes, sir.

Q. 4. How long have you been in that character of business—farming, ranching, stock-raising, etc.?

A. Since about 1883.

Q. 5. Where do you carry on such business?

A. I am associated with Mr. Porter, ten miles west of this place, and have a ranch directly west of Chouteau.

Q. 6. In the summer of 1889 were you acquainted with the market value of hay put up upon the prairie in this section of country?

A. Yes, sir.

Q. 7. I will ask you what was the market value of prairie hay in the rick in the month of August, 1889, in the section of country in which you say you were engaged in business?

A. I paid one dollar a ton in the stack on the prairie.

Q. 8. Is that the market value of it, do you think?

A. That is what I thought it was worth—what I paid for it.

Q. 9. Do you know of a custom, or whether there is any custom or practice, that prevails among the people in this section of country and the section of country in which you say you have been conducting this business, as to protecting ricks of hay upon the prairie from fire?

A. I don't know whether it is a custom or not, but I usually had mine plowed around.

The COURT: The question is as to the custom.

Q. 10. Do you know what was generally done?

A. I know what was generally done around the hay I had put up; I don't know about others. I know what I did around our hay ricks; had them plowed around.

Q. 11. Do you know anything as to the custom or practice as to the measurement of hay in the section of country named, to determine how many tons there were in a given rick?

A. Yes, sir; I have bought it two different ways; I have bought it at seven square feet and seven and a half square feet, after the stacks had stood thirty days.

Q. 12. Do you know anything about the proportion of hay
126 in ricks that is fit for baling, and what proportion of such hay is unfit for baling?

A. No, sir.

Cross-examination by Mr. ROGERS:

Q. 1. Where did you buy this hay in the summer of 1889 that you spoke of? Where located?

A. About a mile or a mile and a half from the station of Inola, on the Kansas and Arkansas railroad.

Q. 2. Where is Inola?

A. Fifteen miles or a little over from Wagoner.

Q. 3. For what purpose did you buy it?
A. For feeding cattle.
Q. 4. You weren't undertaking to bale any for shipment?
A. No, sir.
Q. 5. That was the only hay you bought in 1889?
A. No, sir; I bought hay ten miles west of here.
Q. 6. For what purpose did you buy that?
A. For feeding to cattle.
Q. 7. Did you buy any other during that season, any large quantity?
A. Yes, sir; I bought some.
Q. 8. Where?
A. Here.
Q. 9. For what purpose did you buy that?
A. For cattle and horses here in town.
Q. 10. Does that embrace your purchases?
A. That is all I remember.
Q. 11. You are not engaged in buying and shipping hay at all?
A. No, sir; I never had anything to do with that kind of business.

F. B. Russell, of lawful age, having first been duly sworn on the part of the defendants, testified as follows:

Examined by Mr. Jackson:

Q. 1. Give the jury your full name?
A. Frank B. Rogers.
Q. 2. What is your business?
A. Engineer.
Q. 3. What kind of engineer?
A. Locomotive engineer.
Q. 4. On what road?
A. The M., K. & T.
Q. 5. What division?
A. Cherokee and Neosho.
Q. 6. Between what points do you run?
A. Muscogee to Parsons and Parsons to Junction City.
127 Q. 7. How long have you been running over the M., K. & T. railroad from Parsons, Kansas, to Muscogee, Indian Territory?
A. About five years.
Q. 8. Please state to the jury the relative danger to trains running over the M., K. & T. railway through the Indian Territory from Wagoner north for a few miles to the engineers and employés upon the trains and to passengers upon such trains, when the right of way has been burned off during the summer months and when the old grass has been permitted to remain upon the right of way.

Question objected to by counsel for plaintiffs as incompetent, irrelevant and immaterial.

Counsel for defendants offer to prove by this witness upon the

stand that when the right of way of the railway at the time and in the vicinity of where this fire is claimed to have been set out and to have burned this hay, has been burned off, that shortly afterwards the green grass comes up and that the cattle (and there are vast numbers of them that roam the prairies in that vicinity along the line of the railway) will congregate immediately along the track and upon the track, and thereby render the operation of the railway much more dangerous to the property of the railway and of the people shipping over the railway, as well as to the lives of its servants and employés, in the management of trains and to the lives of passengers upon those trains; and that if the right of way is not burned off until such period of time in the fall as the new grass will not grow until spring, the relative danger is much less to this class of property and to the people.

COUNSEL FOR PLAINTIFFS: I submit to the court that there are two remedies for that; one is to fence the track, the other is to burn off again and again.

Objection overruled by the court.

To which ruling of the court, plaintiffs, by their counsel, at the time excepted and still except.

No answer.

Q. 9. Now, you heard the statement and know what I want to ask you. State this matter in your own way. Tell what the facts are.

A. I have noticed since I have been running on the road that new grass would sprout up and cattle collect more than on the old grass. Stock are very bothersome, indeed, where the grass has been burned off. Of course they will seek where the new grass is to get the new grass.

Q. 10. What increased danger, if any, is there toward wrecking the different trains that pass over the road, by reason of the cattle being there?

128 A. A great deal of danger. Where there is the most cattle there is most danger, because it is very hard to drive them off the new grass. With all the efforts we can make, we cannot drive them off the new grass at times. They will collect there.

No cross-examination.

COUNSEL FOR PLAINTIFFS: We formally save an exception to the ruling of the court in admitting the testimony of this witness.

JAMES D. WILLISON, of lawful age, having first been duly sworn on the part of the defendants, testified as follows:

Examined by Mr. JACKSON:

Q. 1. Please give the jury your name.

A. James D. Willison.

Q. 2. Where do you reside?

A. I have been residing at Gibson Station; I live here now.

Q. 3. Until what time did you reside at Gibson?

A. Until last month.

Q. 4. How long had you resided at Gibson Station previous to last month?

A. About three years, I guess; three or four years. I have been there seven or eight years.

Q. 5. In what business were you engaged during the time you lived at Gibson Station?

A. I have been farming, and in the hay business some, and stock-raising, etc.

Q. 6. How far was your home at Gibson Station from Wagoner?

A. Six miles.

Q. 7. Have you, or not, been engaged in the business of putting up prairie hay; ricking it?

A. Yes, sir; I have been in that business.

Q. 8. Do you know what kind of a machine or ricker you used in putting up that hay?

A. Yes, sir; I used an "Acme."

Q. 9. What is that?

A. That is the Acme ricker.

Q. 10. Is that, or not, such a machine as you used in putting up your hay? (Referring to a cut and pamphlet shown to witness.)

A. That is exactly the machine, I think. I think it looks like it.

Q. 11. Did you use such a machine as this in the summer of 1888?

A. Yes, sir; I used two of them.

129 Q. 12. Do you know who used those two rickers in the summer of 1889?

A. The two rickers I used belonged to Lafayette Brothers in 1889, and they were turned back to them when I got through with the job.

Q. 13. Do you know when and where, if at all, Lafayette Brothers used those two rickers in the summer of 1889?

A. 1889?

Q. 14. Yes, sir.

A. I don't know, sir; when I seen them they offered to sell the machinery to me and afterwards sold it in 1889, but I did not see them stack any hay that season, but they sold the stackers at the end of the season.

Q. 15. Where did you see these two rickers in the season of 1889?

A. At Wagoner; at their hay camp; Lafayette went to sell them to me.

Q. 16. Which Lafayette showed them to you?

A. Mose.

Q. 17. Brother to this Mr. Lafayette?

A. Yes, sir.

Q. 18. Do you know as to whether or not Ben. F. Lafayette or Mrs. Hailey had any hay burned close to Wagoner in the season of 1889?

A. I never saw the hay.

Q. 16. Did you see the ground after the fire went over it?

A. No, sir; I never was at their camp after the fire.

Q. 20. I will ask you to state to the jury from your knowledge of these rickers, how high a rick can be built with hay thrown by one of these rickers?

A. Well, I don't think I ever built any hay stack higher than——

The COURT: The question is how high can it be thrown.

A. I don't think it could be thrown higher than fifteen feet.

Q. 21. How high are the rickers themselves?

A. I think the arm of those rickers, I don't know exactly, but I suppose there was about twelve feet and a slide on them of a couple of feet; a man might have got a couple higher than the ricker.

Q. 22. From this figure, which you identify, please explain to the jury how those rickers work.

Question objected to by counsel for plaintiffs as incompetent, irrelevant and immaterial, and because the witness not shown to know what rickers were used.

The COURT: I think you had better examine him on the ricker.

130 Q. 23. Just explain to the jury the operation of the ricker.

A. This arm of the ricker (referring to plate or figure) the teeth are attached to. That arm from where it has it is attached here to the base of the ricker I suppose would be twelve feet long. That arm rests on the ground when you load the hay on. This arm is raised by a rope until perpendicular and until the hay drops off. When the ricker is standing up it is about sixteen feet down to the ground, and a slide is there that would raise that about two feet. That is as near as I can explain it.

Q. 24. In the summer of 1889 were you familiar with the value of hay in the rick per ton in the vicinity of Gibson and Wagoner?

A. Yes, sir; I was familiar with the prices of hay.

Q. 25. Please tell what the price was. What was the price of hay per ton at that place, at that time, per ton?

A. $1 to $1.25 per ton. That was the value put on hay for that purpose. I did not ship any that season.

Q. 26. Well, was there any difference in the value of hay for feeding purposes in the rick and in the value of hay for shipping purposes in the rick?

A. I don't know that there would be.

Q. 27. Were you familiar with the rule that prevailed in that section of the country at that time, if there was such a rule, with reference to the measurement of hay in the rick to determine how many tons were in a given rick?

A. Yes, sir.

Q. 28. Please state to the jury what was the rule of measurement?

A. Seven feet and a half after thirty days' settlement; eight feet at the completion of the rick.

Q. 29. That is, you mean, taking a block seven feet and a half each way?

A. Yes, sir.

Q. 30. That was how long after settlement?

A. Thirty days after settlement; seven feet and a half.

Q. 31. How immediately after the hay was put up?

A. Eight feet.

Q. 32. A square block, a cube, each way?

A. Yes, sir.

Q. 33. Were you familiar with the custom or practice that prevailed in that section, if there was such a custom or practice, as to protecting ricks of hay upon the prairie from fire?

A. Yes, sir.

Q. 34. What was that custom?

A. They had a custom of burning around it if too dry to plow, and if wet enough to plow, to plow around it, to save it from fire.

Q. 35. When was the burning or plowing done as to the time the hay was cut?

A. Immediately after the hay was put up was our custom.

131 (Counsel for defendant:)

Q. 36. Who do you mean by our?

A. The people in the hay business.

Q. 37. Were you familiar with the amount of hay that was generally lost in baling the hay from the ricks?

A. Yes, sir.

Q. 38. How much hay was generally lost in baling hay from the rick?

A. Different in the season and the length of time it had been cut. That made quite a difference, but we always calculated that hay would fall short about one-third. The actual weight after measuring always falls short about one-third.

Q. 39. Suppose that the hay had been put up along in the latter part of June or during the month of July and stood until the middle of August?

A. I would not be so familiar with that; but there is waste more or less. I could not answer what the waste would be on that.

Q. 40. Do you know the plaintiff in this case, Sallie M. Hailey?

A. Yes, sir.

Q. 41. What relation, if any, are you to Mrs. Hailey?

A. I am a brother of Mrs. Hailey.

Cross-examination by Mr. ROGERS:

Q. 1. You say you are a brother of Mrs. Hailey?

A. Yes, sir.

Q. 2. What is the relationship between you and the plaintiffs in this suit, friendly or disagreeable?

A. I have no animosity against anybody that I know of.

Q. 3. Did you not, in 1888, go to where they were baling hay and throw the band off their engine?

A. No, sir; I did not.

Q. 4. Did you not state to this man here, the plaintiff in this case, in Wagoner, in the hotel of Mrs. Hailey, that you threw that band off that machine? Do you know Mr. Shepard, a lawyer, here?

A. Yes, sir.

Q. 5. Did you not admit to Mr. Shepard, in his office in this city, that you had done that?

A. I admitted that I went and stopped them from baling hay. I didn't put off the band.

Q. 6. Didn't you write to your sister, after this hay was destroyed, that you would see that she did not get the money for the hay?

A. No, sir.

Q. 7. Didn't you tell her so as well as write to her?

A. No, sir.

Q. 8. Why did you go out there and interfere with those men's business?

A. They were on my premises.

132 Q. 9. What do you mean by your premises?

A. My premises in the Creek nation, right inside of my claim.

Q. 10. Did you have a fence around it?

A. I had furrows around it; cut hay there myself. I owned that place; was running that camp and cut that hay.

Q. 11. You were?

A. Yes, sir.

Q. 12. In 1888?

A. Yes, sir.

Q. 12½. Were you engaged in it?

A. I was running the business for Judge Hailey.

Q. 13. Was he a Creek?

A. He was a white man.

Q. 14. Don't you know that Judge Hailey had no interest in that business?

A. I never knew the contract; simply had his word.

Q. 15. Don't you know that Judge Hailey was doing this business and got his foot hurt, and sent you temporarily?

A. He was out at my camp.

Q. 16. Weren't you out there because he was injured, to see to it for him?

A. No, sir.

Q. 17. Didn't you buy a lot of supplies and take them out there and consume them?

A. It was by direction of Judge Hailey that I bought them.

Q. 18. It was Judge Hailey's business, you say, not Mrs. Hailey's.

A. It was his business.

Q. 19. Weren't you representing Judge Hailey?

A. Yes, sir.

Q. 20. Then you weren't interested in it except as his agent?

A. I was as much interested as Judge Hailey.

Q. 21. What kind of a contract had you?

A. A verbal contract.

Q. 22. You got into a controversy with these people—Judge Hailey and these people—about the hay?

A. Yes, sir.

Q. 23. You went out there and interfered with them?

A. I went out there simply to hold my hay that was cut on my place under contract between Judge Hailey and me; just asked them to move off my premises.

Q. 24. Did they move off?

A. Yes, sir; Mr. Lafayette came over and we satisfactorily settled that business.

Q. 25. What Lafayette?

A. Mr. Ben. Lafayette.

Q. 26. Now, you state that you did not write to your sister, after this hay was burned, that you would see that she did not get the money for her hay?

133 A. I don't think I did. I don't remember.

Q. 27. Didn't you do it, is what I am talking about, not what you remember?

A. I don't know that I done it.

Q. 28. If you had written a letter to your sister about a matter of this kind, and a suit pending in court in regard to it, do you pretend you don't recollect it.

A. I don't recollect it.

Q. 29. Can you not state certainly whether you did or not?

A. I am pretty certain I did not.

Q. 30. You cannot state whether you wrote a letter about such a matter as this pending in court?

A. I don't think I wrote to my sister a letter about this particular case. I may have written about a hay case. I am not a scholar.

Q. 31. It don't take a scholar to tell the truth. Anybody can tell the truth.

A. I can say I never wrote a letter relative to this case that I know of. The first contract Judge Hailey and I and Mr. Lafayette was engaged in was when they required a little money and Judge Hailey got it of me to pay the hands. I asked for my money several times, but made no threats against anybody. All I remember saying anything about this case, I only told some one that I did not believe Mrs. Hailey had a dollar in the hay that was burned. I think that is all the remark I made about the hay.

Q. 32. When did you make that?

A. I couldn't tell you that. We were talking about the hay. I don't recollect who it was.

Q. 33. How do you know you said it if you don't know who it was?

A. I have said that much to some one; I don't know who it was.

Q. 34. Why would you make a statement of that kind about your sister unless you know something about it?

A. A man is liable to have his idea. I might have expressed

that confidentially. She spoke to me about it. I said I made the remark, but I didn't mean anything, probably.

Q. 35. That you didn't believe that she had a dollar in this contract?

A. Yes, sir.

Q. 36. When were you subpœnaed as a witness?

A. Last fall.

Q. 37. You said you didn't believe a rick of hay could be put up with an Acme ricker you were using higher than sixteen or fifteen feet—how much?

A. Sixteen feet.

Q. 38. Do you mean to say that the machine would not throw it any higher than that; did you work this machine yourself?

A. Yes, sir.

134 Q. 39. Did you ever measure the length of the arms used in throwing the hay up?

A. No, sir.

Q. 40. Have you looked over this picture book presented to you?

A. Yes, sir.

Q. 41. You know how these machines are made?

A. I can take one down and put one up and run it.

Q. 42. Let me read this (reads from the book referred to): * * * "By this means a rick or stack twenty-five feet high can be built."

A. I can't build one that high.

Q. 43. You think the book is wrong?

A. I think the book is wrong? You cannot build a hay stack that high.

Q. 44. Now, you spoke about measuring hay by a seven and a half foot cube, didn't you; didn't you sell hay to Mr. Turner, measuring by seven instead of seven and a half; in the year 1889, didn't you sell to Clarence Turner hay and have it measured seven feet square instead of seven and a half.

A. I don't remember that I ever sold him any hay. There was hay on my place sold to him, but I don't think I ever sold it.

Q. 45. In 1888 or 1889?

A. I don't think I sold him any, ever. He bought hay on my place.

Q. 46. Do you know how it was measured—the hay bought on your place?

A. No, sir.

Q. 47. Reflect on it and see if it was not in 1889. I am not sure whether it was in '87, '88, or '89.

A. I cannot remember selling Turner any hay.

Q. 48. Did you ever sell to anybody by the seven-foot measurement?

A. Yes, sir.

Q. 49. ——.

—. I sold millet hay by weight after measurement.

Q. 50. Did you ever sell any prairie hay on the seven-foot measurement?

A. I never sold anybody hay on the seven-foot measurement after thirty days' settling.

Q. 51. Did you ever sell any at all at seven feet?

A. No, sir, except millet.

Q. 52. Who did you sell that to?

A. Sold that to Joe Denny.

Witness discharged.

JOHN D. MOORE, of lawful age, having first been duly sworn on the part of the defendants, testified as follows:

135 Examined by Mr. JACKSON:

Q. 1. What business have you been engaged in during the past few years?

A. I have been farming; sometimes contracting hay and putting in stack.

Q. 2. Where have you been putting hay in the stack?

A. In the Cherokee nation and the Creek nation.

Q. 3. Were you or not engaged in such business in 1889?

A. Yes, sir.

Q. 4. Were you familiar with the market value of hay in the rick in the vicinity of Wagoner or in that section of country in 1889?

A. No, sir; I am not familiar with the price. I just put up the hay that I put up on contracts.

Q. 5. Were you familiar with what hay would bring in the rick? What it was worth in the rick?

A. I put up hay for a dollar a ton; some hay for $1.20 a ton. I never sold any hay.

Q. 6. In putting up hay upon the prairie what rickers have you been in the habit of using?

A. I have been in the habit of using the Dane ricker.

Q. 7. Did you ever see the Acme ricker used?

A. Yes, sir.

Q. 8. Do you know how high prairie hay can generally be put up in the rick with the Acme ricker?

A. I know about how high it can be put up. Stacks vary.

Q. 9. Generally?

A. From 16 to 22 feet before they settle. After they settle they settle down to from nine to about fifteen feet after stacking by the Acme and Dane both.

Q. 10. How long would it take to settle down to the height you have indicated?

A. Thirty days.

Q. 10½. Were you familiar with the rule, if there was such a rule, for the measurement of hay in the rick to determine how many tons there was in a given rick?

A. Yes, sir.

Q. 11. Tell the jury what such rule is.

A. The rule is seven feet and a half—seven and a half cubic

feet. That is the general rule. That is what they claim it takes to make a ton.

Q. 12. When you say seven and a half cubic feet, what do you mean?

A. Multiply seven and a half by seven and a half and then multiply the product by seven and a half.

Q. 13. Were you familiar with the rule that existed in that section of the country, if any such rule or practice did exist, in 1889, as to the protection of ricks of hay on the prairie from fire?

A. Yes, sir.

136 Q. 14. What was the rule?

A. To plow a fire-guard around; one furrow ten feet from the stack and then ten or twelve feet further to plow another furrow and then burn that out.

Q. 15. How soon was that done after the hay was put in the rick?

A. Just a few days.

Cross-examination by Mr. ROGERS:

Q. 1. When you were cutting this hay in 1889, for what purpose were you putting it up?

A. I was putting it up for men that had cattle and who were aiming to feed it.

Q. 2. How far from the road was it that you were putting it up?

A. Some twelve miles from Wagoner.

Q. 3. From the railroad or from Wagoner?

A. Five or six miles from Wagoner.

Q. 4. It was intended for consumption where it was put up?

A. Yes, sir.

Q. 5. You didn't engage in putting it up for shipping purposes?

A. No, sir.

Q. 6. This custom of plowing and burning around stacks was where it was to be put up as quickly as possible to ship?

A. All hay is in danger of fire after it is stacked. It is the custom to break around all I had anything to do with.

Q. 7. You say you had nothing to do with putting up hay for shipment; only for feeding. Do you know what the custom was with reference to hay cut and ricked and then baled and shipped as fast as possible? Do you know what the custom was then?

A. No, sir; I don't know what custom shippers used. It is the custom among cattlemen to have the fire-guard broke and burned around in just a few days.

BEN. F. LAFAYETTE, of lawful age, having first been duly sworn on the part of the defendants, testified as follows:

Examined by Mr. JACKSON:

Q. 1. What kind of a ricker did you use in putting up the ricks which you now claim were burned by this fire?

A. I never saw the rickers, but from my best information it was the Acme ricker.

Q. 2. You never saw the rickers at any time?

A. I never did.

Q. 3. Were you never on that hay camp when you were putting up hay?

A. No, sir; I never went to the camp; I went to Wagoner; went out in the evening.

137 Q. 4. You saw the rickers, didn't you?

A. I might have seen them standing there. I paid little attention to them. I knew they were the Aeme rickers. My brother superintended the matter.

Q. 5. Isn't it true that these rickers which were used in putting up your hay in 1889 were the same rickers which Mr. Willison has testified about and which he used in 1888?

A. I don't say they were not. I couldn't say they were. I wasn't present when they were used.

Q. 6. Don't you recollect talking to me at my office on several different occasions with reference to those rickers? Don't you recollect that you told me those were the same rickers?

A. I don't recollect that part of the conversation. I recollect that I promised to give you the name of the ricker. If I have made any such statement I have forgotten it. I do not think that you would make any statement that is not true.

Q. 7. Did you not tell me that as far as the rickers were concerned it was not necessary for me to have any proof that those were the rickers that were used?

A. I don't remember that.

CLIFFORD L. JACKSON, of lawful age, having first been duly sworn on the part of the defendants, testified as follows:

I state, gentlemen, that on several different occasions I have talked with Mr. Lafayette about this particular suit, our relations having always been very friendly and are so at the present time, and Mr. Lafayette told me on at least two different occasions that there would be no controversy as to the rickers in question: that the rickers were at the time he believed at Wagoner and were the same rickers used in the season of 1888 by Mr. Willison in putting up his hay.

Mrs. SALLIE M. HAILEY, of lawful age, having first been duly sworn on the part of the plaintiffs, was by consent of parties, examined at this time on the part of the plaintiffs, and testified as follows:

Examined by Mr. ROGERS:

Q. 1. I will ask you if you had some sort of a contract or arrangement with Mr. Lafayette during the year 1888 in reference to hay?

A. Yes, sir.

Q. 2. Where is your husband?

A. He is dead.

Q. 3. You are one of the plaintiffs in this suit—one of the parties who sued for this hay?

A. Yes, sir.

138 Q. 4. This is the contract you entered into with Mr. Lafayette (handing witness a paper)?

A. Yes, sir.

Q. 5. You are interested in this hay as specified in the contract?

A. Yes, sir.

Q. 6. Are you the party in good faith interested in the terms of this contract?

A. Yes, sir.

Q. 7. I will ask you who were the parties interested in the contract of 1888?

A. Mr. Lafayette and myself.

Q. 8. Did your husband have any interest in that contract?

A. No, sir; he acted for me.

Q. 9. Did Jim Willison have any interest in the hay?

A. Nothing whatever; he had no contract.

Q. 10. I will ask you whether Jim Willison had any interest at all in that hay contract of 1888?

A. No, sir.

Q. 11. How did he appear to have any interest in it at all?

A. My husband got crippled and got him to attend to it.

Q. 12. Is this your signature to the contract?

A. Yes, sir.

Q. 13. And this?

A. That is my husband's signature.

Q. 13². He signed the bill of sale of the hay in 1888 to Mr. Lafayette?

A. Yes, sir.

Plaintiffs now offered this contract in evidence.

Counsel for defendants objects to the introduction of this contract (of 1888) as incompetent, irrelevant and immaterial.

COUNSEL FOR PLAINTIFFS: I offer it to impeach the witness Willison.

Counsel for defendants further objects to the contract on the ground that this is the contract of a married woman without her husband being joined, and she is incompetent to enter into such a contract.

COUNSEL FOR PLAINTIFFS: It is offered only for impeaching purposes.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

The above-named bill of sale and contract was now read in evidence to the jury (signed by Sallie M. Hailey and witnessed by her husband), and is in words and figures as follows:

139 "Memorandum of agreement made and entered into this, the — day of ——, 1888, by and between Sallie M. Hailey of the first part, and Ben. F. Lafayette, of the second part—

Witnesseth: That in consideration of the sum of six thousand dollars ($6,000.00) the said Sallie M. Hailey hereby sells and conveys to the said Ben. F. Lafayette two thousand tons of hay, being all of the hay stacked and baled north and west of Wagoner, I. T.; also one hay press, three paulins, two mowers, a lot of rakes, a ricker and one wagon and harness.

SALLIE M. HAILEY.

WILLIAM L. HAILEY, *Witness.*

Personally appeared before me, the undersigned, the United States Indian agent for the Indian Territory, Sallie M. Hailey, and acknowledged that she had executed the foregoing instrument.

ROBERT L. OWEN,
U. S. Indian Agent."

Q. 13. Were you present when your husband signed this?

A. Yes, sir.

Q. 14. You say that when this hay was being cut in the summer of 1888, your husband met with an accident; what was the nature of it?

A. His foot was cut.

Q. 15. When that accident occurred he requested your brother to go out and represent him?

A. Yes, sir.

Q. 16. Do you know anything about a direction, or anything of that kind, by Mr. Hiley to him to furnish supplies?

A. No, sir; he bought a few things.

Q. 17. You mean your brother?

A. Yes, sir.

Q. 18. Under whose direction, if at all?

A. He said in order to keep the business running. It was a little inconvenient for Mr. Lafayette to send supplies at the time they were needed. He would get a few things sometimes. I don't know. He said that he bought them. I didn't see the things.

Q. 19. Do you know whether your husband gave him any direction or not?

A. I don't think he instructed him to do that particularly. He did it of his own accord.

Q. 20. Do you know, of your own knowledge, whether he forbade him doing it?

A. No, sir.

Q. 21. Did he forbid him?

A. No, sir.

Q. 22. Did you know anything about the trouble he got into out at the hay camp?

A. No, sir.

140 Q. 23. Did you ever talk to him about it?

A. No, sir.

Q. 24. You heard of it?

A. Yes, sir.

Q. 25. Did you receive a letter from him since this controversy

arose about this hay, saying that he would see that you didn't get your money?

Question objected to by counsel for defendants as incompetent, irrelevant and immaterial.

Objection overruled by the court.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

A. No, sir.

Q. 25. Did you receive a letter from your brother relating to this hay?

A. Yes, sir.

Q. 26. Where is that letter?

A. I destroyed it.

Q. 27. When was it received?

A. Soon after the hay was burned.

Q. 28. When was it destroyed?

A. I couldn't say when—what time I destroyed it.

Q. 29. Do you remember what the occasion of the letter was—what caused him to write it?

A. Yes, sir; he was not on friendly terms with Mr. Lafayette. He wrote me that he would see that he did not get his money. He didn't say anything about me.

Q. 30. You say that letter is gone?

A. Yes, sir.

Q. 31. That was very shortly after the hay was burned?

A. Yes, sir.

Q. 32. Was there anything in that letter as to whether you had any interest in that letter or not?

A. No, sir.

Q. 33. He did not mention that?

A. No, sir.

Cross-examination by Mr. JACKSON:

Q. 1. You say that you are interested in the hay burned in August, 1889?

A. Yes, sir.

Q. 2. What is your interest in the hay in controversy in this suit? What interest have you in it?

Question objected to by counsel for plaintiffs as incompetent, irrelevant and immaterial.

Objection sustained by the court.

141 To which ruling of the court defendants, by their counsel, at the time excepted and still except.

Q. 3. When you signed this contract did you know its contents?

A. Yes, sir.

Q. 5. Can you state them?

The COURT: You need not answer that. The contract speaks for itself.

To which ruling of the court defendants, by their counsel, at the time excepted and still except.

Counsel for plaintiff now offer in evidence article V of the statutes of the Creek nation, as contained in the compilation of their laws of March 1st, 1890, and particularly section two (2) of said act, which was in force at the time the hay in controversy was cut and put up and also when it was burned, and which is hereby referred to and made part of this record, and which is in words and figures as follows, to wit:

"ARTICLE V.

Traders.

* * * * * * *

SEC. 2. No non-citizen licensed trader, who has not intermarried with a citizen of this nation, shall be allowed to inclose more than two acres of our public domain, nor be allowed to cut and put up hay from our common pasturage, and any non-citizen, not intermarried, licensed trader, found cutting and putting up hay from the common pasturage shall be fined ten dollars per acre for each acre so cut and put up."

BEN. F. LAFAYETTE, of lawful age, having first been duly sworn on the part of the defendants, testified as follows:

Q. 1. Are you a married man or not?
A. I am not.
Q. 2. Have you ever been married?
A. I have not, sir.

The testimony-in-chief on the part of the defendants being now closed, the following testimony was offered and introduced on the part of the plaintiffs in rebuttal:

Rebuttal.

BEN. F. LAFAYETTE, a witness heretofore sworn and examined in this cause, having been recalled on the part of the plaintiffs, testified as follows in rebuttal:

142 Examined by Mr. ROGERS:

Q. 1. You heard the statement of Mr. Willison when I asked him about throwing the band off the engine. I asked him if he did not make that statement to you at Mrs. Hailey's hotel at Wagoner.

A. Yes, sir; I went to the hotel there in response to a telegram that the band had been thrown from my engine. Mr. Willison was sitting there, with his revolvers around his waist. I asked Mr. Willison if he had thrown the band off my engine. He said "yes;" that he did not propose that there should be any more hay baled there; that he had an interest in that business.

Q. 2. That was at the hotel at Wagoner?

A. Yes, sir; at the hotel.
Q. 3. Did he say anything about his authority to do so?
A. Yes, sir; he put his hand on his revolver and said "This is my authority."
Q. 4. When was that?
A. In the year 1888.
Q. 5. Had he made that statement in your presence and that of Mr. Shepard?
A. I was not present.
Q. 6. Had he any interest at all in that hay contract?
A. None whatever.
Q. 7. Who had?
A. Mrs. Hailey and myself.
Q. 8. Had Mr. Hailey any interest in it?
A. No, sir.

Cross-examination by Mr. JACKSON:

Q. 1. Do you know whether Mrs. Hailey was running the hotel in Wagoner in 1888?
A. No, sir; I correct myself; Mrs. Shannon was running the hotel at that time; Mrs. Hailey took it shortly afterwards.
Q. 2. Are you positive it was Mrs. Shannon?
A. Mrs. Hailey succeeded Mrs. Shannon; the same house, the Hotel Bernard.
Q. 3. At what terms are you with Mr. Willison at the present time?
A. On speaking terms.
Q. 4. Your matters still unadjusted?
A. I have not anything to adjust with him; I never had any business associations with him.
Q. 5. Then you never had any settlement with him?
A. No, sir; I never had any business associations with him.

The COURT:

Q. 6. Answer the question; you never had any settlement with him, then, you say?
A. No, sir.

Plaintiffs rest.
This was all the testimony offered by either party.

143 MONDAY, *June* 29, 1891.

Counsel for defendants moves the court to direct the jury to return a verdict in favor of the defendants.
Which motion was by the court overruled, and the court refused to so instruct the jury.
To which action of the court in overruling the motion of defendants to direct the jury to find a verdict for the defendants, defendants, by their counsel, at the time excepted and still except.
Whereupon, defendants, by their counsel, requested the court to instruct the jury as follows, to wit:

1.

"The court instructs the jury that in order to find a verdict in favor of plaintiffs in this cause, that you must find from the evidence in this case that the hay claimed to have been burned was the joint property of Benjamin F. Lafayette and Sallie M. Hailey."

Which request of the defendants to so charge the jury the court refused and denied, to which action of the court in so refusing and declining to charge the jury as requested by defendants, the defendants then and there at the time, in the presence of the jury, and before the jury had retired from the bar of the court, duly excepted and still excepts.

2.

Defendants then requested the court to instruct the jury as follows, to wit:

"The court instructs the jury that if you find from the evidence in this case that the hay claimed by the plaintiffs to have been burned by sparks cast out from the fire of one of defendants' engines, was cut upon the public domain of the Creek nation and not upon land owned or possessed by plaintiff Sallie M. Hailey, and that plaintiff Lafayette was a licensed trader in the Indian Territory, under and by virtue of a license issued to him through the War Department of the United States Government, that plaintiff cannot recover in this case."

Which request of the defendants to so charge the jury the court refused and denied; to which action of the court in so refusing and declining to so charge the jury, as requested by defendants, the defendants then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still except.

3.

Defendants thereupon requested the court to charge the jury as follows, to wit:

144 "The court instructs the jury that if you find that at the time of the institution of this suit, and at the time the hay mentioned in plaintiffs' complaint was cut, and at the time said hay was claimed by said plaintiffs to have been burned, that George A. Eddy and Harrison C. Cross, as receivers of the Missouri, Kansas and Texas railway, were in charge and possession of a strip of ground along the east side of their railway track of said Missouri, Kansas and Texas railway, and between said track and the place where said hay is claimed by said plaintiffs to have been burned; that said strip of ground extended along the east side of said railway immediately adjacent thereto, and was one hundred feet in width, extending east from the center of the track of said railway.

And you further find from the evidence in this case that any part of the hay which you may find to have been burned from fire set out by sparks cast out from engines on the Missouri, Kansas and Texas railway, was cut upon said strip of ground or right of way, and you are unable from the evidence in this case to determine

what particular part of such hay so burned as aforesaid was cut from grass that grew upon said strip of ground or right of way of said railway, and that the hay so cut from the grass so grown upon said strip or right of way was ricked in common with the other hay of plaintiffs burned at said time and was mixed and mingled with the other hay of plaintiffs burned at such time, and that such hay so cut from such grass so grown upon the right of way of said railway was not cut by the authority or with the knowledge or consent of said receivers of said railway, then you will find that plaintiffs in so cutting such hay from grass grown upon said right of way of defendants' railway, were trespassers and cannot recover for the value of the hay taken as aforesaid from the said right of way, nor for the hay which was ricked in common and mixed and mingled by these plaintiffs with such other hay of plaintiffs."

Which request of the defendant- to so charge the jury the court refused and denied; to which action of the court in so refusing and declining to so charge the jury as requested by the defendant-, the defendant- then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

4.

The defendant- thereupon requested the court to instruct the jury in the case as follows, to wit:

"The court instructs the jury that railroad companies are only bound to exercise reasonable judgment and care to prevent fire or sparks from escaping from the locomotives while running on their road, and in keeping their track or right of way free and clear from combustible material, so as to prevent injury by fire to farms
145 or property along the line of their roads; and in this connection reasonable care and diligence is such care and diligence as a careful, prudent and skillful man would observe under like circumstances to prevent injury to his own property, equally exposed; and if the jury believe, from the evidence, that the defendant- in this case did exercise all such reasonable care, diligence and skill to prevent injury by fire to the property of the plaintiff-, that is all the law requires, and the plaintiff- cannot recover."

Which request of the defendant- to so charge the jury, the court refused and denied; to which action of the court in so refusing and declining to so charge the jury as requested by defendant-, the defendant- then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

5.

The defendants thereupon requested the court to instruct the jury in this case as follows, to wit:

"The court instructs the jury that the defendants, in the operation of their railway, are only bound to reasonable and ordinary care in preventing combustible materials accumulating on or near its right of way, and in keeping its machinery, engines and right of way in repair and proper condition, and in furnishing the engines with all

the most approved appliances and inventions for preventing the escape of fire; that the degree of such care is in no way dependent upon the state of the weather or wind, or as to whether it is wet or dry, calm or stormy, and that the speed of defendants' railway trains must always be the same, for the necessity of regularity and uniformity in their running are not matters of choice and convenience merely, but involve the purposes and safety of trains everywhere along the road, and that they may not vary with wind or weather; and if they are run with ordinary and reasonable care and are provided with proper fire-escapes and approved spark-arresters, and reasonable care is exercised to keep the right of way free from combustible material, that then the risk of danger devolves on those who establish themselves or reside along such road, as incidents of their situation, for the defendants, receivers of said railway, in merely exercising their rights, are not in fault."

Which request of the defendant- to so instruct the jury, the court refused and denied; to which action of the court in so refusing and declining to so instruct the jury as requested by the defendant-, the defendant- then and there at the time, in the presence of the jury, and before the jury had retired from the bar of the court, duly excepted and still except.

146 6.

Defendants thereupon requested the court to instruct the jury in this cause as follows, to wit:

"The court instructs the jury that although they, the jury, may find from the evidence that the fire in question originated on defendants' right of way by reason of fire escaping from one of its engines, still if you further believe from the evidence that such engine was properly constructed and had all of the most approved appliances and inventions for preventing the escape of fire, and that the defendant exercised all reasonable care and diligence and watchfulness to keep the same in repair, and further that the defendant used all reasonable care and diligence to prevent dry weeds and grass and other combustible materials from accumulating on and near its right of way where the fire originated, and also that defendants' servants used all such care and diligence in running and managing the engines and in keeping the track clear to prevent fires, as prudent and careful men are accustomed to use under like circumstances, then the jury should find for defendants."

Which request of the defendant- to so instruct the jury the court refused and denied; to which action of the court in so refusing and declining to so instruct the jury as requested by the defendant-, the defendant- then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

7.

The defendants thereupon requested the court to instruct the jury in this case as follows, to wit:

"The court instructs the jury that if you find from all the evi-

dence in this case that the fire which plaintiffs claim that defendants set out and which injured them would not have occurred if the plaintiffs had used the care in the protection of their property which a man of ordinary prudence under like circumstances would have used, then the plaintiff- cannot recover."

Which request of the defendant- to so instruct the jury the court refused and denied; to which action of the court in so refusin*h* and declining to so instruct the jury as requested by the defendants the defendant- then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

8.

The defendant- thereupon requested the court to instruct the jury in this case as follows, to wit:

147 "The court instructs the jury that it was not negligence in the defendant to suffer such natural accumulation of dry grass and other combustible material on the sides of its track, which was liable to and was ignited by sparks of fire from its engines, unless it was to such an extent as would not be prudent nor done by a cautious man upon his own premises, if exposed to the same hazard from fire, were the combustible accumulation upon his right of way."

Which request of the defendant- to so instruct the jury the court refused and denied; to which action of the court in so refusing and declining to so instruct the jury as requested by the defendant-, the defendant- then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

11.

The defendant- thereupon requested the court to instruct the jury in this case as follows, to wit:

"The court instructs the jury that in this case, if you find the fire in question originated upon defendants' right of way, then defendants are not liable to plaintiff- in any sum."

Which request of the defendant- to so instruct the jury the court refused and denied; to which action of the court in so refusing and declining to so instruct the jury as requested by defendant-, the defendant- then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

12.

The defendant- thereupon requested the court to instruct the jury in this case as follows, to wit:

"The court instructs the jury that negligence consists in a want of reasonable care which would be exercised by a person of ordinary prudence under all existing circumstances in view of the probable danger of injury."

Which request of the defendant- to so instruct the jury the court refused and denied; to which action of the court in so refusing and

declining to so instruct the jury as requested by the defendant-, the defendant- then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

13.

The defendant- thereupon requested the court to instruct the jury in this case as follows, to wit:

"The court instructs the jury that if you find from the evidence in this case that the plaintiffs did not use any effort to pro-
148 tect their hay, which they allege was burned by sparks cast out by defendants' engine, either by plowing around the ricks of hay in question or by making fire-guards around the same, or using other means, such as a careful, prudent person should have done, and that because of such failure to so protect said hay, that the same was burned, you will find for the defendants"

Which request of the defendant- to so instruct the jury, the court refused and denied; to which action of the court in so refusing and declining to so instruct the jury as requested by defendant-, defendant- then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

15.

The defendant- thereupon requested the court to instruct the jury in this cause as follows, to wit:

"The court instructs the jury that if you find in this case that it was a matter of reasonable doubt from all the evidence whether the burning of the hay complained of by the plaintiffs can be attributed to any negligence on the part of the defendants or their agents or servants, then you will find for the defendant-."

Which request of the defendant- to so instruct the jury, the court refused and denied; to which action of the court in so refusing and declining to so instruct the jury as requested by the defendant-, the defendant- then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

16.

The defendant- thereupon requested the court to instruct the jury in this case as follows, to wit:

"The court instructs the jury that the plaintiff, Sally M. Hailey, was not competent to contract with plaintiff, Benjamin F. Lafayette, as to the hay in question and therefore you will disregard the written contract introduced in evidence by the plaintiffs in this case as to the cutting and putting up of the hay in controversy."

Which request of the defendant- to so instruct the jury the court refused and denied; to which action of the court in so refusing and declining to so instruct the jury as requested by the defendant-, the defendant- then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

17.

The defendant- thereupon requested the court to instruct the jury in this case as follows, to wit:

149 "The court instructs the jury that if you find from the evidence that there was a market for hay in the rick in the neighborhood and in the vicinity of where the hay in controversy was burned that then you will disregard all testimony as to the market for hay at other places than the neighborhood and vicinity in which the hay in controversy was burned."

Which request of the defendant- to so instruct the jury the court refused and denied; to which action of the court in so refusing and declining to so instruct the jury as requested by the defendant-, the defendant- then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

18.

Whereupon the defendant- requested the court to instruct the jury in this cause as follows, to wit:

"The court instructs the jury that in determining in this case what was the reasonable market value of the hay in controversy that you will disregard all testimony in this case as to the value of hay at places other than in the neighborhood and vicinity of where the hay in controversy was burned. Also that you will disregard all testimony as to the cost of baling, hauling and putting hay upon the cars at any point, and will confine yourselves solely and consider only the testimony in this case upon the question of the value of such hay in the rick in the neighborhood and vicinity of where this hay was ricked at the time it was burned."

Which request of the defendant- to so instruct the jury the court refused and denied; to which action of the court in so refusing and declining to so instruct the jury as requested by defendant-, the defendant- then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepts and still excepts.

20.

The defendant- thereupon requested the court to instruct the jury in this cause as follows, to wit:

"The court instructs the jury that if you should find for the plaintiffs in this case that in arriving at the amount of damages you will consider only the testimony as to the value of such hay, and that you will not include in the amount of damages you may find interest in any sum or for any time upon such damages, but shall simply find for plaintiffs such sum as you may believe the hay burned was worth at the time and place it was burned."

Which request of the defendant- to so instruct the jury the court refused and denied; to which action of the court in so refusing and declining to so instruct the jury as requested by the defend-

150 ant-, the defendant- then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

21.

Defendants thereupon requested the court to instruct the jury as follows, to wit:

"The court instructs the jury that the plaintiffs in this case had the right to stack the hay in controversy upon the land adjoining to the defendants' railway, and that in so doing plaintiffs thereby took the risk of accident by fire, if occasioned by defendants' negligence; yet if the plaintiffs were also guilty of negligence in not plowing around the ricks of hay claimed to have been burned or in omitting to do such acts as would have protected the property and prevented such loss, then such omission on their part is contributory negligence and will prevent plaintiffs from recovering in this case."

Which request of defendants to so instruct the jury the court refused and denied; to which action of the court in so refusing and declining to instruct the jury as requested by the defendants, the defendants then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

22.

The defendants thereupon requested the court to instruct the jury in this case as follows, to wit:

"The court instructs the jury that if you find from the evidence in this case, that the hay claimed by the plaintiffs to have been burned by sparks cast out from the fire of one of defendants' engines, was cut upon the public domain or open lands of the Creek nation and not upon land owned or possessed by plaintiffs or either one or both of them, that then plaintiffs cannot recover in this case."

Which request of the defendants to so instruct the jury the court refused and denied; to which action of the court in so refusing and declining to so instruct the jury as requested by the defendants, the defendants then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

23.

Defendants thereupon requested the court to instruct the jury in this case as follows, to wit:

"The court instructs the jury that if you find from the evidence in this case that the hay claimed by the plaintiffs to have
151 been burned by sparks cast out from the fire of one of defendants' engines was cut upon the public domain or open lands of the Creek nation, and not upon land owned or possessed by plaintiffs or either one or both of them, and that said hay was so cut upon the said public domain or open lands of the Creek nation, without the consent of the said Creek nation or its officers or agents, that then the plaintiffs cannot recover in this action."

Which request of the defendants to so instruct the jury the court refused and denied; to which action of the court in so refusing and

declining to so instruct the jury as requested by the defendant-, the defendant- then and there at the time, in the presence of the jury, and before the jury had retired from the bar of the court, duly excepted and still excepts.

24.

The defendants thereupon requested the court to instruct the jury in this case as follows, to wit:

"The court instructs the jury that in order for plaintiffs to recover in this case, even should they find that defendants were negligent in allowing and permitting dry grass and combustible material to accumulate on their right of way, and that the fire in question begun upon defendants' right of way and thence spread to a like accumulation of grass upon the ground where plaintiffs' hay was stacked, and thence to the hay and burned it, you must further find that the negligence of defendant- in that respect was greater than that of plaintiffs."

Which request of the defendants to so instruct the jury the court refused and denied; to which action of the court in so refusing and declining to so instruct the jury as requested by the defendant-, the defendant- then and there at the time, in the presence of the jury, and before the jury had retired from the bar of the court, duly excepted and still excepts.

25.

Defendants thereupon requested the court to instruct the jury in this case as follows, to wit:

"The court instructs the jury that if you find from the evidence in this case that it was the custom of the people in the neighborhood and vicinity of where the hay of these plaintiffs was claimed to have been burned to plow around such ricks as were stacked upon the prairie, or to make a fire-guard around such ricks, that you may consider the fact of there being such a rule, or practice, or custom, to so protect hay stacked or ricked upon the prairie by such plowing or such fire-guard in determining as to whether or not these plaintiffs were guilty of such negligence as directly contributed to the burning of the hay in controversy."

152 Which request of the defendant- to so instruct the jury the court refused and denied; to which action of the court in so refusing and declining to so instruct the jury as requested by the defendant-, the defendant- then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

26.

The defendant- thereupon requested the court to instruct the jury in this case as follows, to wit:

"The court instructs the jury that if you find from the evidence in this case that it was the custom and practice of people who ricked hay in the vicinity of where plaintiffs' hay in controversy in this action was ricked to plow around such ricks or to make fire-guards around them, within a short period after the building of such ricks,

and that these plaintiffs failed and neglected to so protect the hay alleged in their complaint in this action to have been burned, that these plaintiffs were guilty of such negligence as will prevent their recovery in this cause."

Which request of the defendants to so instruct the jury the court refused and denied; to which action of the court in so refusing and declining to so instruct the jury as requested by the defendants, the defendants then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court duly excepted and still excepts.

The defendants thereupon requested the court to instruct the jury in this case as follows, to wit:

"The court instructs the jury that under the evidence in this case it is shown that a custom existed amongst the people living in the vicinity and neighborhood of where the hay in controversy in this case was burned to protect ricks of hay upon the open prairie lands by fire-guards by plowing around the same and by burning a strip of ground between the furrows so plowed around such ricks, and that if you find from the evidence in this case that the plaintiffs did not within a reasonable time after the construction of the ricks of hay claimed to have been burned so protect such ricks of hay with such fire-guards as above described, then you may consider such circumstance in determining whether plaintiffs were guilty of negligence in not properly protecting their hay in controversy, and if you find they were guilty of negligence which directly contributed to the burning of such hay, then you will find for defendants."

Which request of the defendants to so instruct the jury the court refused and denied; to which action of the court in so refusing and declining to so instruct the jury as requested by the defendants, the defendants then and there at the time, in the presence of
153 the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

Whereupon the court read to the jury the following charge in writing:

Charge of the Court.

BEN. F. LAFAYETTE and SALLIE M. HAILEY, Plaintiffs,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the M., K. & T. Railway, Defendants.

Court's charge to the jury.

This is a suit brought by the plaintiffs, Ben. F. Lafayette and Sally M. Hailey, against the defendants, Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas & Texas railroad, to recover damages for the loss of certain hay alleged to have been burnt and destroyed by fire caused by the negligence of defendants, their employés and servants, and without the fault or negligence of the plaintiffs. It is alleged in the plaintiffs' complaint that on the 20th

day of August, 1889, said defendants, contrary to their duty in that regard, carelessly and negligently omitted to keep their right of way, which was one hundred feet in width on each side from center of their track, clear and free of combustible material, but negligently permitted large quantities of dry grass and weeds to accumulate over and upon said track and right of way, near the premises of the plaintiff. That on said day defendants were operating and running over its said road an engine which was of unskillful and defective construction and was not supplied with the best appliances and contrivances for arresting sparks and preventing the emission of coals of fire from its smokestack; and that on said day the servants, agents and employés of said defendants, in operating and running said engine over said line of road near the premises of Sallie M. Hailey, in the Indian Territory, negligently and carelessly permitted said engine to cast out sparks and coals of fire therefrom into the dry grass and other combustible materials on defendants' right of way and set fire thereto, which spread on and over the land of plaintiff, the fire being continuous; that the plaintiffs, Sallie M. Hailey and Ben. F. Lafayette, were jointly putting up, curing, etc., and had cut and cured and put up large quantities of hay for sale, in the proceeds and profits of which they were to share in certain proportions. That said fire, catching as aforesaid on defendants' right of way, spread rapidly on the premises of said plaintiff, Hailey, and to the hay of said plaintiffs, and burned up and destroyed 666⅔ tons
of hay, the property of the plaintiffs, of the value of $1 per
154 ton, without any fault or negligence on the part of the plaintiffs, to their damage in the sum of $2,666.

Plaintiffs further aver that they used every endeavor, and employed such assistance as they could, to stop and put out such fire, to their damage in the sum of $19.50.

Whereupon they pray judgment for $2,666.00.

The defendants, in their answer, deny each and all the allegations in the plaintiffs' complaint contained.

The allegations in the plaintiffs' complaint and the denials in defendants' answer contained, form the issues which the jury are to try.

And the court instructs the jury:

I.

That the burden of the proof is on the plaintiffs, who, in order to recover, must have established by a fair preponderance of the evidence all the material allegations in their complaint contained.

II.

The court further instructs the jury that a railway company is responsible in damages for fires along its track only when the same are caused by the negligence of the company.

III.

The court further instructs the jury that in order to find for the plaintiffs the jury must believe, from the evidence, that the hay al-

leged to have been destroyed by fire was the property of the plaintiffs; that is to say, that each of them owned an interest in said hay.

IV.

The court further instructs the jury that a railroad company is only bound to exercise reasonable care and diligence to prevent sparks of fire from escaping from its locomotives while running over its road, and in keeping its track and right of way free and clear from combustible materials, so as to prevent injury by fire to farms and other property along its line of track. In other words, a railroad company is only required to exercise such care and diligence as a careful, prudent and skillful man would exercise under like circumstances to prevent injury to his own property equally exposed. But the court says to the jury that in this case the defendants have adduced no evidence of their having exercised any sort of care or diligence to prevent sparks of fire from escaping from their locomotive while running the same over their road on the day named, nor on any other day; nor have they adduced any evidence to
155 show that they had kept their track and right of way free and clear from combustible materials. Therefore, the jury must determine these questions from the other evidence in the case.

V.

The court further instructs the jury that the defendants, in the operation of their railway are only bound to exercise reasonable care, skill and diligence in preventing the accumulation of combustible materials on their track and right of way, also in the keeping of their engines, machinery and right of way in good repair and proper condition; also in the furnishing of engines with all the most improved inventions and appliances, and provided with proper fire escapes and approved spark-arresters to prevent the escape of sparks and fire. In this case, however, the defendants have failed to adduce any evidence on any of these requirements and the jury will determine the questions from the other evidence in the case.

VI.

The court instructs the jury that if they shall believe from the evidence that the plaintiffs by their own fault or negligence contributed to the burning of their hay by the fire, then they cannot recover.

VII.

The court further instructs the jury that it is not sufficient for the plaintiffs to prove that the fire which burnt and destroyed their hay might have proceeded from defendants' locomotive, but it must be shown by reasonable affirmative testimony that the fire did so originate.

VIII.

The court further instructs the jury that although they may believe from the evidence that the defendants, their employés, agents

and servants were guilty of negligence, resulting in the burning of plaintiffs' hay, yet, if the jury shall also believe from the evidence that the plaintiffs, by their own fault or negligence, contributed to the burning and loss of the hay, then they cannot recover.

IX.

The court further instructs the jury that if they shall believe from the evidence that there was a custom in the community or section of the country where plaintiffs hay is alleged to have been burned and destroyed by fire, a custom which was general, uniform and of long standing, to plow around ricks or stacks of hay on the prairie, or to make fire-guards around the same, then the jury may consider the fact of their being such a custom, if such was the fact, as a circumstance in determining the question as to whether or not the plaintiffs, by their own fault or negligence, contributed to the burning and loss of their hay.

156 X.

The court further instructs the jury that evidence of a railway company allowing combustible materials to accumulate upon its track and right of way which is liable to take fire from sparks escaping from passing engines and communicate it to adjacent property, is sufficient to warrant the jury in imputing negligence to the company.

XI.

The court further instructs the jury that evidence showing that the fire originated from sparks of a passing engine is *prima facie* proof of negligence, and the burden shifts on the railway company to show that it was guilty of no negligence.

XII.

It is the duty of a railroad company to keep its right of way clear of combustible materials, and failure to do so is a circumstance showing negligence.

XIII.

The court further instructs the jury that if they shall find for the plaintiffs, then the measure of damages is the market value of the hay when burned, together with interest at six per cent. per annum from the date of the destruction of the hay.

XIV.

The court further instructs the jury that where the market value cannot be fixed by the proof of the local markets it may be done by proof of value at the nearest point where similar property is bought and sold, with such addition or deduction for cost of transportation and the hazard and expense incident thereto, as may be necessary to determine its actual value at the place of injury.

XV.

The court instructs the jury that they are the judges of the testimony, and that they will carefully weigh the same, and applying it to the law as given you by the court they will find their verdict for the party in whose favor the evidence preponderates.

This was the entire charge of the court to the jury in this case.

Defendants in the presence of the jury and before the jury had retired from the bar of the court objected and excepted to that part of the court's charge to the jury in this case which is contained in paragraph 4th of said charge, as follows, to wit:

"The court further instructs the jury that a railroad company is only bound to exercise reasonable care and diligence to pre-
157 vent sparks of fire from escaping from its locomotives while running over its road and in keeping its track and right of way free and clear from combustible materials, so as to prevent injury by fire to farms and other property along its line of track. In other words, a railroad company is only required to exercise such care and diligence as a careful, prudent and skillful man would exercise under like circumstances to prevent injury to his own property equally exposed. But the court says to the jury that in this case the defendants have adduced no evidence of their having exercised any sort of care or diligence to prevent sparks of fire from escaping from their locomotives while running the same over their road on the day named nor on any other day, nor have they adduced any evidence to show that they have kept their track and right of way free and clear from combustible materials. Therefore, the jury must determine these questions from the other evidence in the case."

Defendants in the presence of the jury and before the jury had retired from the bar of the court objected and excepted to that part of the court's charge to the jury in this case which is as follows, to wit:

"But the court says to the jury that in this case the defendants have adduced no evidence of their having exercised any sort of care or diligence to prevent sparks of fire from escaping from their locomotives while running the same over their road on the day named nor on any other day, nor have they adduced any evidence to show that they had kept their track and right of way free and clear from combustible materials."

Defendants in the presence of the jury and before the jury had retired from the bar of the court objected and excepted to that part of the court's charge to the jury in this case which is contained in paragraph fifth, as follows, to wit:

"The court further instructs the jury that the defendants in the operation of their railway are only bound to exercise reasonable care, skill and diligence in preventing the accumulation of combustible materials on their track and right of way; also in the keeping of their engines, machinery and right of way in good repair and proper condition; also in the furnishing of engines with all the most improved inventions and appliances, and provided with proper

fire-escapes, and approved spark-arresters to prevent the escape of sparks and fire. In this case, however, the defendants have failed to adduce any evidence on any of these requirements, and the jury will determine these questions from the other evidence in the case."

Defendants in the presence of the jury and before the jury had retired from the bar of the court objected and excepted to that part of the court's charge to the jury in this case which is as follows, to wit:

158 "In this case, however, the defendants have failed to adduce any evidence on any of these requirements, and the jury will determine these questions from the other evidence in the case."

Defendants in the presence of the jury and before the jury had retired from the bar of the court objected and excepted to that part of the court's charge to the jury in this case, which is contained in paragraph IX of said charge, as follows, to wit:

"The court further instructs the jury that if they shall believe from the evidence that there was a custom in the community or section of the country where plaintiffs' hay is alleged to have been burned and destroyed by fire, a custom which was general, uniform and long standing to plow around ricks or stacks of hay on the prairie, or to make fire-guards around the same, then the jury may consider the fact of there being such a custom, if such was the fact, as a circumstance in determining the question as to whether or not the plaintiffs by their own fault or negligence contributed to the burning of their hay."

Defendants in the presence of the jury and before the jury had retired from the bar of the court objected and excepted to that part of the court's charge to the jury in this case as contained in paragraph X of said charge, as follows, to wit:

"The court further instructs the jury that evidence of a railroad company allowing combustible materials to accumulate upon its track and right of way which is liable to take fire from sparks escaping from passing engines and communicate it to adjacent property, is sufficient to warrant the jury in imputing negligence to the company."

Defendants in the presence of the jury and before the jury had retired from the bar of the court objected and excepted to that part of the court's charge to the jury in this case as is contained in paragraph XII of said charge, as follows, to wit:

"It is the duty of a railroad company to keep its right of way clear of combustible materials, and failure to do so is a circumstance showing negligence."

Defendants in the presence of the jury and before the jury had retired from the bar of the court objected and excepted to that part of the court's charge to the jury in this case as is contained in paragraph XIII of said charge, as follows, to wit:

"The court further instructs the jury that if they shall find for the plaintiff-, then the measure of damages is the market value of the hay when burned, together with interest at six per cent. per annum, from the date of the destruction of the hay."

Defendants in the presence of the jury and before the jury had retired from the bar of the court objected and excepted to
159 that part of the court's charge to the jury in this case which is contained in paragraph XIV of said charge, as follows, to wit:

"The court further instructs the jury that where the market value cannot be fixed by the proof of the local market it may be done by proof of value at the nearest point where similar property is bought and sold, with such addition or deduction for cost of transportation and the hazard and expense incident thereto, as may be necessary to determine its actual value at the place of injury."

Whereupon the counsel for plaintiff made the opening argument to the jury, and thereupon defendants' counsel made an argument on behalf of defendants, and was followed by plaintiffs' counsel in the closing argument to the jury.

Plaintiffs' counsel, during the closing argument to the jury in this cause, in beginning the discussion of the question as to how the prices of commodities are fixed, whether at the place where they are produced or the place where they are sold, used the following language:

"We have been trying for the past ten years to bring railroads under the control of the public law, like other people."

To which language and remark of counsel for plaintiffs defendants, by their counsel, then and there and in the presence of the jury and before the jury had retired from the bar of the court, objected and excepted, for the reason that said language and remark was improper and was calculated to unduly prejudice the minds of the jury in this cause against the defendants; which objection was overruled by the court.

To which action of the court in so overruling defendants' objection, defendants, by their counsel, then and there at the time duly excepted and still except.

Defendants' counsel thereupon requested the court to instruct the jury to disregard such statements of the plaintiffs' counsel, and to admonish plaintiffs' counsel to proceed no further with such line of argument; which request of defendants' counsel the court then and there refused, to which action of the court in so refusing and declining to instruct the jury to disregard such language and remark of plaintiffs' counsel and to admonish plaintiffs' counsel to proceed no further with such line of argument, defendants, by their counsel, then and there at the time duly excepted and still except.

Thereupon plaintiffs' counsel continued and said that "the object of this legislation has been to so regulate and control the freight charges as that the surplus products shall not be consumed en route to the markets of the world, where our surplus products are consumed and their prices fixed," and then proceeded to argue that the prices of all surplus are not fixed by the market where they are
160 produced, but by the great centers of trade where they are shipped, applying this argument to the hay in question.

And thereupon after the argument of counsel the jury retired from the bar of the court for the purpose of considering their verdict,

and after remaining in their room and duly considering the matters in this case, the jury returned into open court their verdict in favor of plaintiffs in the sum of $2,664.00.

Whereupon defendants give notice of motion for new trial, and afterwards in open court and during the said May, A. D. 1891, term thereof filed a motion for a new trial. Which said motion is in words and figures as follows, to wit:

In the United States Court in the Indian Territory, First Judicial Division, May Term, A. D. 1891.

BEN. F. LAFAYETTE and SALLY M. HAILEY, Plaintiffs,
vs.
G. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway, Defendants. } No. 765.

Motion for New Trial.

Now come the defendants in open court during the said May, A. D. 1891, term of said court and move the court to grant a new trial in this cause, for the following reasons, to wit:

First. Because the court erred in refusing to allow the challenge of defendants' counsel to one M. S. Lawson, one of the jurors called in this case after the defendants had exhausted their peremptory challenges. Wherefore the defendants were prevented from having a fair trial.

Second. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case, the depositions of W. S. Johnson.

Third. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case the deposition of French Godby.

Fourth. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case the deposition of Henry White.

161 Fifth. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case the deposition of C. C. Keezee.

Sixth. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case the deposition of P. J. Lenhard.

Seventh. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case the deposition of J. P. Linzee.

Eighth. The court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case the deposition of John Manlove.

Ninth. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case the deposition of Peter Frasier.

Tenth. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case the deposition of John T. Abercrombie.

Eleventh. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case the deposition of George Wirth.

Twelfth. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury the deposition of F. O. Voetter.

Thirteenth. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case the deposition of Ed. McKenna.

Fourteenth. Because the court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case the deposition of W. H. McMurry.

Fifteenth. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts
162 of the deposition of witness W. S. Johnson as were objected to by defendants' counsel.

Sixteenth. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness French Godby as were objected to by defendants' counsel.

Seventeenth. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness Henry White as were objected to by defendants' counsel.

Eighteenth. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness C. C. Keezee as were objected to by defendants' counsel.

Nineteenth. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness P. J. Lenhard as were objected to by defendants' counsel.

Twentieth. Because the court erred in permitting plaintiffs' counsel to introduce and read in evidence to the jury such parts of the deposition of witness J. P. Linzee as were objected to by defendants' counsel.

Twenty-first. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness John Manlove as were objected to by defendants' counsel.

Twenty-second. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness Peter Frazier as were objected to by defendants' counsel.

Twenty-third. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness John T. Abercrombie as were objected to by defendants' counsel.

Twenty-fourth. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness George Wirth as were objected to by defendants' counsel.

Twenty-fifth. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness F. O. Voetter as were objected to by defendants' counsel.

163 Twenty-sixth. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness Ed. McKenna as were objected to by defendants' counsel.

Twenty-seventh. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury such parts of the deposition of witness W. H. McMurry as were objected to by defendants' counsel.

Twenty-eighth. Because the court erred in permitting plaintiffs to amend their complaint during the trial of this cause against defendants' objection, by making the same show the date of the fire complained of to have been on the 20th day of August, 1889, instead of the 30th day of August, 1889, as was alleged in said complaint originally.

Twenty-ninth. Because the court erred in permitting the plaintiffs' witness, Moses Lafayette, to testify as to the difference between the market value of early-cut hay and late-cut hay, against the objection of defendants.

Thirtieth. Because the court erred in permitting plaintiffs' witness, Moses Lafayette, to testify as to the value of hay baled and loaded in the cars, against the objection of defendants.

Thirty-first. Because the court permitted the plaintiffs' witness, Moses Lafayette, to testify as to the cost of taking hay from the rick and baling and loading on the cars, against the objection of defendants.

Thirty-second. Because the court erred in permitting plaintiffs' witness, Moses Lafayette, to testify as to the value of hay on the Arkansas market, against the objection of defendants.

Thirty-third. Because the court erred in permitting plaintiffs' witness, Moses Lafayette, to testify as to what was the value of hay loaded on the cars at Wagoner, Indian Territory, as governed by the market value of hay in the market of Arkansas, against the objections of defendants.

Thirty-fourth. Because the court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury the contract

between Mrs. Sallie M. Hailey and Ben. F. Lafayette, identified as "Ex. A, June 26th, '91, W. R. S.," against the objection of defendants.

Thirty-fifth. Because the court erred in permitting plaintiff Lafayette, as a witness in his own behalf, to testify as to the value of other grades of hay than the hay claimed to have been burned, against the objection of defendants.

Thirty-sixth. Because the court erred in permitting plaintiff Lafayette, as a witness in his own behalf, to testify as to the
164 value of hay at other points than in the vicinity and neighborhood of where the hay in controversy was burned, against the objection of defendants.

Thirty-seventh. Because the court erred in permitting plaintiffs' counsel to offer in evidence and read to the jury the book exhibited by plaintiff Lafayette, and called "hay ledger," against objection of defendants.

Thirty-eighth. Because the court erred in permitting plaintiff Lafayette, as a witness in his own behalf, to testify as to the price received for hay at different times and different points as shown by said book, against the objection of defendants.

Thirty-ninth. Because the court erred in overruling defendants' motion, made upon the close of the plaintiffs' testimony, to strike out all testimony offered by plaintiffs.

Fortieth. Because the court erred in permitting plaintiffs' counsel, after the close of plaintiffs' testimoay, to amend plaintiffs' complaint by striking out the words "number 63," being the words which indicated the particular engine which set out the fire in question.

Forty-first. Because the court erred in declining to postpone the trial of this case, as requested by defendants immediately after plaintiffs had amended their complaint by striking out the said words "number 63," in order to enable defendants to meet the new state of case presented by the complaint as amended.

Forty-second. Because the court erred in refusing, upon defendants' motion, to withdraw from the jury and strike out from this cause the written contract offered by plaintiffs.

Forty-third. Because the court erred in overruling defendants' motion to withdraw from the jury and strike out from this cause all testimony offered by the plaintiffs.

Forty-fourth. Because the court erred in refusing to permit witness E. N. Ratcliff to testify as to the proportion of hay in the rick that could be baled for sale upon the market.

Forty-fifth. Because the court erred in permitting plaintiffs' counsel, upon cross-examination of witness, E. N. Ratcliff, to show by such witness that the witness received hay at Little Rock, Ark., against the objection of the defendants.

Forty-sixth. Because the court erred in stating before the jury at the close of the testimony of witness F. M. Davis, that the fact of some people doing a thing and other people not doing it in the same neighborhood did not establish any custom.

Forty-seventh. Because the court erred in permitting counsel for

plaintiff to introduce in evidence and read to the jury the contract between plaintiffs of A. D. 1888, against defendants' objection.

165 Forty-eighth. Because the court erred in refusing to permit defendants' counsel to cross-examine plaintiff, Sallie M. Hailey, as to her interest in the hay in controversy in this cause.

Forty-ninth. Because the court erred in refusing to instruct the jury to return a verdict in favor of defendants, as requested by defendants.

Fiftieth. Because the court erred in permitting counsel for plaintiff, in their closing argument, to use to the jury the following language: "We have been trying for the past ten years to bring the railroads under the control of the law like other people," against the objection of defendants' counsel.

Fifty-first. Because the court erred in refusing to instruct the jury, as requested by defendants' counsel, in request to the court numbered from one to twenty-one, inclusive.

Fifty-second. Because the court erred in its charge to the jury as contained in paragraphs one to fifteen, inclusive, and also in that part of its charge prior to the words, "The court instructs the jury."

Fifty-third. Because the amount of damages assessed by the jury in this case *are* excessive.

Fifty-fourth. Because the amount of damages assessed by the jury in this case *are* excessive, and appear to have been determined upon by the jury under the influence of passion and prejudice.

Fifty-fifth. Because the verdict of the jury is against the evidence.

Fifty-sixth. Because the verdict of the jury is against the weight of the testimony.

Fifty-seventh. Because the verdict of the jury is against the law.

Fifty-eighth. Because the verdict of the jury is against the law and the evidence.

CLIFFORD L. JACKSON,
Attorney for Defendants.

Indorsed: "No. 765. U. S. court in the Indian Territory, first judicial div. Ben. F. Lafayette and Sally M. Hailey *versus* Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway. Motion for a new trial. Filed July 10, 1891. Wm. Nelson, clerk. C. L. Jackson, attorney for defendants."

166 Which said motion was by the court seen and heard, and the court being fully advised in the premises, overruled said motion, to which action of the court in so overruling said motion for a new trial, defendants then and there at the time duly excepted and still except.

Thereupon defendants filed written objections to the entering of the judgment on the verdict returned in this case, which objections are in words and figures as follows:

"In the United States Court in the Indian Territory, First Judicial Division, May Term, A. D. 1891.

BEN. F. LAFAYETTE and SALLIE M. HAILEY, Plaintiffs,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway, Defendants. } Number—.

Now at this time come the defendants, by their attorney, after verdict in this case being returned by the jury, and after motion for new trial being overruled, and before judgment being rendered or entered upon said verdict, and object to the court rendering or entering judgment upon the verdict rendered by the jury in this case, upon the following grounds:

First. Because the amount of damages assessed by the jury in this case is excessive.

CLIFFORD L. JACKSON,
Attorney for Defendants.

Indorsed: "No. 765. U. S. court in I. T., first judicial division. Lafayette and Hailey *vs.* Geo. A. Eddy and H. C. Cross, receivers of M., K. & T. R'y. Objections to entering judgment on verdict in this case. Filed July 10, 1891. Wm. Nelson, clerk."

Which said objections were seen and heard by the court and were by the court overruled; to which action of the court in so overruling such objections, defendants then and there at the time duly excepted and still except.

Whereupon, by consent of all parties, it was ordered by the court that defendants have sixty days within which to file a bill of exceptions in this cause, and that a stay of execution be had during that time.

And now come the defendants before the Honorable James M. Shackelford, judge of the United States court in the Indian Territory, on this — day of September, A. D. 1891, and within the said period of time so allowed by the court and present and tender its bill of exceptions and pray that the same be allowed, signed
167 and sealed and made a part of the record in this cause, which is now accordingly done.

In witness whereof, I, the undersigned, judge of the United States court in the Indian Territory, this 10th day of September, A. D. 1891, have set my hand and affixed my seal in chambers.

[SEAL.] JAMES M. SHACKELFORD,
Judge of the United States Court in the Indian Territory.

We agree upon the above bill of exceptions.

SANDELS, WARNER & HUTCHINGS,
Attorneys for Plaintiffs.
CLIFFORD L. JACKSON,
Attorney for Defendants."

Indorsed: "No. 765. Filed this September 10th, 1891. W. Nelson, clerk. Ben. Lafayette *et al. vs.* Geo. A. Eddy and H. C. Cross, receivers M. K. & T. R'y. Bill of exceptions."

Afterwards, to wit, on the 11th day of September, A. D. 1891, the following further proceedings were had in said cause and entered of record, to wit:

BEN. F. LAFAYETTE *et al.*
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway. } 765.

On this day come the above-named defendants, by their attorneys, and file herein their assignments of error.

Which are in words and figures as follows, to wit:

"*Assignments of Error.*

In the *the* United States Court in the Indian Territory, First Judicial Division.

BEN. F. LAFAYETTE and SALLIE M. HAILEY, Plaintiffs,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway, Defendants. } No. 765.

And now comes George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, by their attorneys, and say that in the foregoing record and proceedings there is manifest error in this, to wit:

I.

Said court erred in deciding it had acquired jurisdiction over these defendants in this cause.

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II.

Said court erred in overruling the motion to quash the writ of summons and return of the marshal thereon in this cause.

III.

Said court erred in overruling defendants' motion to quash the depositions of W. S. Johnson, Henry White, French Godley, C. C. Keezee, P. J. Lehnhard, J. P. Linzee and John Manlove, certified to have been taken before Joseph French, notary public, in the city of Pierce City, county of Lawrence, State of Missouri, on April 2d, A. D. 1890.

IV.

Said court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to read to the jury question 19 and answer thereto of the deposition of John Abercrombie, in which answer the witness gives the rule for measuring hay in Arkansas.

V.

Said court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury in this case the depositions of W. S. Johnson, Henry White, French Godley, C. C. Keezee, P. J. Lehnhard, J. P. Linzee and John Manlove.

VI.

Said court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to read to the jury question five and answer thereto of the deposition of W. S. Johnson, in which the witness testified the ricks of hay that were burned were from fifty to sixty feet long and about twenty feet wide and about twenty-five feet high, the witness having previously testified that he had not measured any of the ricks, but had measured off the ground and instructed the workmen as to dimensions of each rick.

VII.

Said court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to read to the jury question 20 and answer thereto of the deposition of witness W. S. Johnson, in which witness testifies in detail as to measurements of each rick of hay claimed to have been burned, from memoranda of measurements which witness states in answer to question 21 were made only partly by himself and partly by others.

VIII.

Said court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to read to the jury question
169 23 and answer thereto of witness Johnson, in which the witness testifies as to cost of cutting and making hay.

IX.

Said court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to read to the jury questions 29 and 30 and the answers thereto of the deposition of witness Johnson, in which the witness testifies as to value of hay that was not burned, and which hay witness testified was of different quality than that claimed to have been burned.

X.

Said court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to read to the jury question 31 and answer thereto of the deposition of witness Johnson, in which witness testifies to the cost of baling hay and loading same on cars.

XI.

Said court erred in overruling defendants' motion to strike out the testimony of the witness French Godley.

XII.

Said court erred in overruling defendants' motion to strike out the testimony of the witness Henry White.

XIII.

Said court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to read to the jury question 5 and answer thereto of the deposition of C. C. Keezee, in which the witness testifies to the difference in value between hay put up in early part of summer and hay put up in latter part of summer.

XIV.

Said court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to read to the jury question 2 and answer thereto of the deposition of P. J. Lehnhard, in which witness testifies to measurement of hay put up in Kansas.

XV.

Said court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to read to the jury question 2 and answer thereto of the deposition of witness J. P. Linzee, in which witness testifies to measurement of hay put up in Iowa.

170 XVI.

Said court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to read to the jury question 2 and answer thereto of the deposition of John Manlove, in which witness testifies to measurement of hay put up in Missouri.

XVII.

Said court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to read to the jury question 3 and answer thereto of the deposition of witness Manlove, in which witness testifies to difference in value between early and late cut hay, it appearing that witness never saw any hay raised in Indian Territory.

XVIII.

Said court erred in overruling defendants' motion to strike out the testimony of W. S. Johnson, Henry White, French Godley, C. C. Keezee, P. J. Lehnhard, J. P. Linzee, John Manlove, Peter Frazier, John P. Abercrombie and George Wirth.

XIX.

Said court erred in permitting witness Lafayette to testify as to the difference in the market value of early and late cut hay, against defendants' objection.

XX.

Said court erred in permitting witness Moses Lafayette to testify as to the cost of taking hay from the rick and baling and loading it on the cars, against defendants' objection.

XXI.

Said court erred in permitting witness Moses Lafayette to testify as to the market value of hay governed by the value of hay in the market of Arkansas, against defendants' objection.

XXII.

Said court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to read to the jury the deposition of witness F. O. Voetter.

XXIII.

Said court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to read to the jury the deposition of witness Ed. McKenna.

171 XXIV.

Said court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to read to the jury the deposition of witness W. H. McMurry.

XXV.

Said court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to introduce in evidence and read to the jury the contract dated May 24th, 1889, between the plaintiffs in this case.

XXVI.

Said court erred in permitting plaintiff, Ben. F. Lafayette, to testify as to difference in the market price between early and late cut hay against the objection of defendants' counsel.

XXVII.

Said court erred in permitting plaintiff, Ben. F. Lafayette, to testify as to the market value of hay based upon the markets of Fort Smith and Little Rock, Arkansas; Memphis, Tenn.; New Orleans, La.; Georgia and Wyandotte.

XXVIII.

Said court erred in permitting plaintiff, Ben. F. Lafayette, to testify as to the cost of baling hay and putting same on board cars against defendants' objection.

XXIX.

Said court erred in permitting book called "hay ledger" to be introduced in evidence and the contents thereof read to the jury

against defendants' objection, the same showing specific sales of hay by witness at different points without the Indian Territory.

XXX.

Said court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to read to the jury each and any part of the contents of said book or each and any item contained in said book.

XXXI.

Said court erred in overruling defendants' motion, after plaintiffs rested their case, to strike out plaintiffs' testimony.

172 XXXII.

Said court erred in permitting plaintiffs' counsel against objection of defendants' counsel, to amend their complaint by striking out the words "No. 63," being the words which indicated the particular engine which set out the fire in question.

XXXIII.

Said court erred in refusing to postpone the trial of this case upon the application and motion of defendants, made after plaintiffs were permitted to amend their complaint.

XXXIV.

Said court erred in overruling defendants' motion to withdraw from the jury and strike from the evidence the written contract introduced by the plaintiffs, dated May 24th, 1889, between Sallie M. Hailey and Ben. F. Lafayette.

XXXV.

Said court erred in overruling defendants' motion to withdraw from the jury and strike from the evidence all testimony offered by the plaintiffs as to the hay that had been proved to have been burned.

XXXVI.

Said court erred in permitting witness Kennedy, on cross-examination, to testify as to the price of hay at Little Rock against the objection of defendant-.

XXXVII.

Said court erred in stating to the jury whilst defendants' witness, F. M. Davis, was on the stand that the fact of some people doing a thing and other people not doing it in the same neighborhood does not establish any custom.

XXXVIII.

Said court erred in permitting plaintiffs' counsel, against the objection of defendants' counsel, to offer in evidence and read to the

jury the bill of sale and contract signed by Sallie M. Hailey as to sale of hay in 1888 to Ben. F. Lafayette.

XXXIX.

Said court erred in refusing to direct the jury in this case to return a verdict in favor of defendants.

173 XL.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that in order to find a verdict in favor of plaintiffs in this cause, that you must find from the evidence in this case that the hay claimed to have been burned was the joint property of Benjamin F. Lafayette and Sallie M. Hailey."

XLI.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that if you find from the evidence in this case that the hay claimed by the plaintiffs to have been burned by sparks cast out from the fire of one of defendants' engines was cut upon the public domain of the Creek nation and not upon land owned or possessed by plaintiff Sallie M. Hailey, and that plaintiff Lafayette was a licensed trader in the Indian Territory under and by virtue of a license issued to him through the War Department of the United States Government, that plaintiff- cannot recover in this case."

XLII.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that if you find that at the time of the institution of this suit, and at the time the hay mentioned in plaintiffs' complaint was cut, and at the time said hay was claimed by said plaintiffs to have been burned, that George A. Eddy and Harrison C. Cross, as receivers of the Missouri, Kansas and Texas railway, were in charge and possession of a strip of ground along the east side of their railway track of said Missouri, Kansas and Texas railway, and between said track and the place where said hay is claimed by plaintiffs to have been burned; that said strip of ground extended along the east side of said railway, immediately adjacent thereto, and was one hundred feet in width, extending east from the centre of the track of said railway.

And you further find, from the evidence in this case, that any part of the hay which you may find to have been burned from fire set out by sparks cast out from engines on the Missouri, Kansas and Texas railway was cut upon said strip of ground or right of way, and you are unable, from the evidence in this case, to determine what particular part of such hay so burned as aforesaid was cut from grass that grew upon said strip of ground or right of way of said railway, and that the hay so cut from the grass so grown upon

said strip or right of way was ricked in common with the other hay of plaintiffs burned at said time, and was mixed and mingled with the other hay of plaintiffs burned at such time, and that such hay so cut from such grass so grown upon the right of way of said railway was not cut by the authority or with the knowledge
174 or consent of said receivers of said railway, then you will find that plaintiffs, in so cutting such hay from grass upon said right of way of defendant railway, were trespassers, and cannot recover for the value of the hay taken as aforesaid from the said right of way, nor for the hay which was ricked in common and mixed and mingled by these plaintiffs with such other hay of plaintiffs."

XLIII.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that railroad companies are only bound to exercise reasonable judgment and care to prevent fire or sparks from escaping from the locomotives while running on their road, and in keeping their track or right of way free and clear from combustible material, so as to prevent injury by fire to farms or property along the line of their roads; and in this connection reasonable care and diligence is such care and diligence as a careful, prudent and skillful man would observe under like circumstances to prevent injury to his own property equally exposed; and if the jury believe, from the evidence, that the defendant- in this case did exercise all such reasonable care, diligence and skill to prevent injury by fire to the property of the plaintiff-, that is all the law requires, and the plaintiff- cannot recover."

XLIV.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that the defendants in the operation of their railway are only bound to reasonable and ordinary care in preventing combustible material accumulating on or near its right of way and in keeping its machinery, engines and right of way in repair and proper condition, and in furnishing the engines with all the most approved appliances and inventions for preventing the escape of fire; that the degree of such care is in no way dependent upon the state of the weather or wind or as to whether it is wet or dry, calm or stormy, and that the speed of defendants' railway trains must always be the same, for the necessity of regularity and uniformity in their running are not matters of choice and convenience merely, but involve the purpose and safety of trains everywhere along the road, and that they may not vary with wind and weather, and if they are run with ordinary and reasonable care and are provided with proper fire-escapes and approved spark-arresters and reasonable care is exercised to keep the right of way free from combustible material, that then the risk of danger devolves on those who establish themselves or reside along such road, as incidents of their situation, for the defendant

receivers of said railway in merely exercising their rights are not in fault."

175 XLV.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that although they, the jury, may find from the evidence that the fire in question originated on defendants' right of way by reason of fire escaping from one of its engines, still if you further believe from the evidence that such engine was properly constructed and had all of the most approved appliances and inventions for preventing the escape of fire and that the defendants exercised all reasonable care and diligence and watchfulness to keep the same in repair, and further that the defendants used all reasonable care and diligence to prevent dry grass and weeds and other combustible materials from accumulating on and near its right of way where the fire originated, and also that defendants' servants used all such care and diligence in running and managing the engines and in keeping the track clear to prevent fires as prudent and careful men are accustomed to use under like circumstances, then the jury should find for defendants."

XLVI.

Said court erred in refusing to instruct the jury, as requested by the defendants, as follows: "The court instructs the jury that if you find from all the evidence in this case that the fire which plaintiffs claim that defendants set out and which injured them would not have occurred if the plaintiff- had used the care in the protecting of his property, which a man of ordinary prudence under like circumstances would have used, then the plaintiffs cannot recover."

XLVII.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that it was not negligence in the defendants to suffer such natural accumulation of dry grass and other combustible material on the sides of its track, which was liable to and was ignited by sparks of fire from its engines, unless it was to such an extent as would not be prudent nor done by a cautious and prudent man upon his own premises, if exposed to the same hazard from fire, were the combustible accumulation upon his right of way."

XLVIII.

Said court erred in refusing to instruct the jury, as requested by defendants in this cause, as follows: "The court instructs the jury that in this case if you find the fire in question originated upon defendants' right of way, then defendants are not liable to plaintiff- in any sum."

176 XLIX.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that negligence consists in a want of reasonable care which would be exercised by a person of ordinary prudence under all existing circumstances, in view of the probable danger of injury."

L.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that if you find from the evidence in this case that the plaintiff did not use any effort to protect their hay, which they allege was burned by sparks cast out from defendants' engine, either by plowing around the same or using other means such as a careful, prudent person would have done, and that because of such failure to so protect said hay that the same was burned, then you will find for the defendant."

LI.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that if you find in this case that it was a matter of reasonable doubt, from all the evidence, whether the burning of the hay complained of by the plaintiffs can be attributed to any negligence on the part of the defendants or their agents or servants, then you will find for the defendants."

LII.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that the plaintiff, Sallie M. Hailey, was not competent to contract with plaintiff, Ben. F. Lafayette, as to the hay in question, and that therefore you will disregard the written contract introduced in evidence by the plaintiffs in this case, as to the cutting and putting up of the hay in controversy."

LIII.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that if you find from the evidence that there was a market for hay in the rick in the neighborhood and vicinity of where the hay in controversy was burned, that then you will disregard all testimony as to any market for hay at other places than the neighborhood and vicinity in which the hay in controversy was burned."

LIV.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that in determining in this case what was the reasonable market value
177 of the hay in controversy that you will disregard all testimony in this case as to the value of hay at places other than

in the neighborhood and vicinity of where the hay in controversy was burned. Also that you will disregard all testimony as to the cost of baling, hauling and putting hay upon the cars at any point, and will confine yourselves solely and consider only the testimony in this case upon the question of the value of such hay in the rick in the neighborhood and vicinity of where this hay was ricked at the time it was burned."

LV.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that if you should find for the plaintiffs in this case that, in arriving at the amount of damages, you will consider only the testimony as to the value of such hay, and that you will not include in the amount of damages you may find interest in any sum, or for any time, upon such damages, but shall simply find for plaintiffs such sum as you may believe the hay burned was worth at the time and place it was burned."

LVI.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that the plaintiffs in this case had the right to stack the hay in controversy upon the land adjoining to the defendant railway, and that in so doing plaintiffs thereby took the risk of accident by fire if occasioned by defendant's negligence, yet if the plaintiffs were also guilty of negligence in not plowing around the ricks of hay claimed to have been burned or in omitting to do such acts as would have protected the property and prevented such loss, then such omission on their part is contributory negligence and will prevent the plaintiffs from recovering in this case."

LVII.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that if you find from the evidence in this case that the hay claimed by the plaintiffs to have been burned by sparks cast out from the fire of one of defendants' engines was cut upon the public domain or upon lands of the Creek nation and not upon land owned or possessed by plaintiffs, or either one or both of them, that then plaintiffs cannot recover in this case."

LVIII.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that if you find from the evidence in this case that the hay, claimed by the plaintiffs to have been burned by sparks cast out from the
178 fire of one of defendants' engines, was cut upon the public domain or open lands of the Creek nation and not upon land owned or possessed by plaintiffs, or either one or both of them, and that said hay was so cut upon the said public domain or open lands of the Creek nation without the consent of the said Creek nation or

its officers or agents, that then plaintiffs cannot recover in this action."

LIX.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that in order for plaintiffs to recover in this case, even should they find that defendants were negligent in allowing and permitting dry grass and combustible material to accumulate on their right of way and thence spread to a like accumulation of grass upon the ground where plaintiffs' hay was stacked and thence to the hay and burned it, you must further find that the negligence of defendant- in that respect was greater than that of plaintiffs."

LX.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that if you find from the evidence in this case that it was the custom of the people in the neighborhood and vicinity of where the hay of these plaintiffs was claimed to have been burned to plow around such ricks as were stacked upon the prairie or to make a fire-guard around such ricks, that you may consider the fact of there being such a rule or practice or custom to so protect hay stacked or ricked upon the prairie by such plowing or such fire-guard in determining as to whether or not these plaintiffs were guilty of such negligence as directly contributed to the burning of the hay in controversy."

LXI.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that if you find from the evidence in this case that it was custom and practice of people who ricked hay in the vicinity of where the plaintiffs' hay in controversy in this action was ricked to plow around such ricks or to make fire-guards around them within a short period after the building of such ricks, and that these plaintiffs failed and neglected to so protect the hay alleged in their complaint in this action to have been burned, that these plaintiffs were guilty of such negligence as will prevent their recovery in this case."

LXII.

Said court erred in refusing to instruct the jury, as requested by defendants, as follows: "The court instructs the jury that under the evidence in this case it is shown that a custom existed
179 amongst the people living in the vicinity and neighborhood of where the hay in controversy in this case was burned to protect ricks of hay upon the open prairie lands by fire-guards, by plowing around the same and by burning a strip of ground between the furrows so plowed around such ricks, and that if you find from the evidence in this case that the plaintiffs did not within a reasonable time after the construction of the ricks of hay claimed to have been burned, so protect such ricks of hay with such fire-guards as

above described, then you may consider such circumstance in determining whether plaintiffs were guilty of negligence in not properly protecting their hay in controversy, and if you find they were guilty of negligence which directly contributed to the burning of such hay, then you will find for defendants."

LXIII.

Said court erred in charging the jury in that part of his charge which is as follows: "The court further instructs the jury that a railroad company is only bound to exercise reasonable care and diligence to prevent sparks of fire from escaping from its locomotives while running over its road, and in keeping its track and right of way free and clear from combustible materials, so as to prevent injury by fire to farms and other property along its line of track. In other words, a railroad company is only required to exercise such care and diligence as a careful, prudent and skillful man would exercise under like circumstances to prevent injury to his own property equally exposed. But the court says to the jury that in this case the defendants have adduced no evidence of their having exercised any sort of care or diligence to prevent sparks of fire from escaping from their locomotive while running the same over their road on the day named, nor on any other day; nor have they adduced any evidence to show that they have kept their track and right of way free and clear from combustible materials. Therefore the jury must determine these questions from the other evidence in the case."

LXIV.

Said court erred in instructing the jury as follows: "But the court says to the jury that in this case the defendants have adduced no evidence of their having exercised any sort of care or diligence to prevent sparks of fire from escaping from their locomotives while running the same over their road the day named, nor on any other day, nor have they adduced any evidence to show that they had kept their track and right of way free and clear from combustible materials."

LXV.

Said court erred in instructing the jury in that part of his charge which is as follows: "The court further instructs the jury that the defendants, in the operation of their railway, are only bound
180 to exercise reasonable care, skill and diligence in preventing the accumulation of combustible materials on their track and right of way; also in keeping of their engines, machinery and right of way in good repair and proper condition; also in the furnishing of engines with all the most improved inventions and appliances, and provided with proper fire-escapes and approved spark-arresters to prevent the escape of sparks and fire. In this case, however, the defendants have failed to adduce any evidence on any of these requirements, and the jury will determine the questions from the other evidence in the case."

LXVI.

Said court erred in instructing the jury as follows: "In this case, however, the defendants have failed to adduce any evidence on any of these requirements, and the jury will determine the question from the other evidence in the case."

LXVII.

Said court erred in instructing the jury as follows: "The court further instructs the jury that if they shall believe from the evidence that there was a custom in the community or section of the country where plaintiffs' hay is alleged to have been burned and destroyed by fire, a custom which was general, uniform and of long standing, *or* to make fire-guards around the same, then the jury may consider the fact of there being such a custom, if such was the fact, as a circumstance in determining the question as to whether or not the plaintiffs, by their own fault or negligence, contributed to the burning and loss of their hay."

LXVIII.

Said court erred in instructing the jury in that part of his charge as follows: "The court further instructs the jury that evidence of a railway company allowing combustible materials to accumulate upon its track and right of way, which is liable to take fire from sparks escaping from passing engines and communicate it to adjacent property, is sufficient to warrant the jury in imputing negligence to the company."

LXIX.

Said court erred in instructing the jury in that part of his charge which is as follows: "It is the duty of a railroad company to keep its right of way clear of combustible materials, and failure to do so is a circumstance showing negligence."

LXX.

Said court erred in instructing the jury in that part of his charge
which is as follows: "The court further instructs the jury
181 that if they shall find for the plaintiffs, then the measure of
damages is the market value of the hay when burned, together with interest at six per cent. per annum from the date of the destruction of the hay."

LXXI.

Said court erred in instructing the jury in that part of his charge which is as follows: "The court further instructs the jury that where the market value cannot be fixed by the proof of the local markets, it may be done by proof of value at the nearest point where similar property is bought and sold, with such addition or deduction for cost of transportation and the hazard and expense incident thereto, as may be necessary to determine its actual value at the place of injury."

LXXII.

Said court erred in permitting plaintiffs' counsel, in the closing argument to the jury, to use the following language:

"We have been trying for the past ten years to bring railroads under the control of the public law like other people," and in declining to instruct the jury to disregard such statement of plaintiffs' counsel as requested by defendants' counsel.

LXXIII.

Said court erred in overruling defendants' motion for new trial.

LXXIV.

Said court erred in overruling defendants' objections to entering of judgment on the verdict in this case.

Wherefore, and for divers other errors, apparent on the face of said record, plaintiffs in error, Geo. A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, pray that the aforesaid proceedings be reversed.

CLIFFORD L. JACKSON,
Attorney for Defendants.

Indorsed: "No. 765. In U. S. court in I. T., first judicial division. Ben. F. Lafayette *vs.* Geo. A. Eddy and H. C. Cross, receivers M., K. and T. R'y. Assignment of error. Filed this 11th day of September, A. D. 1891. Wm. Nelson, clerk."

Afterwards, to wit, on the 12th day of September, A. D. 1891, come the defendants, by their attorney, and file herein their petition for writ of error, duly allowed and signed by the Hon. James M. Shackelford, judge of the United States court in the Indian Territory.

182 Said petition for a writ of error is in words and figures as follows, to wit:

Petition for Writ of Error.

In the United States Court in the Indian Territory, First Judicial Division.

BEN. F. LAFAYETTE and SALLY M. HAILEY, Plaintiffs,
vs.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway, Defendants. } No. 765.

To the Honorable James M. Shackelford, judge of the United States court in the Indian Territory, in and for the first judicial division:

George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, as defendants in the above-entitled

cause, respectfully pray that a writ of error be allowed them in the above-entitled cause, directing the clerk of the first judicial division of the United States court in the Indian Territory to send the record and proceedings in said cause, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, in order that the errors complained of in the said defendants' assignments of error, herewith filed, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

GEO. A. EDDY AND
H. C. CROSS,
Receivers of the Missouri, Kansas and Texas Railway, Defendants,
By their attorney, CLIFFORD L. JACKSON.

Allowed September 12, 1891.
JAMES M. SHACKELFORD,
Judge of U. S. Court in Ind. Ter.

Indorsed: "No. 765. Ben. F. Lafayette and Sallie M. Hailey *vs.* Geo. A. Eddy and H. C. Cross, receivers Missouri, Kansas and Texas Railway. Petition for writ of error. Filed Sept. 12, 1891. Wm. Nelson, clerk."

Afterwards, to wit, on the same day, the same being the 12th day of September, A. D. 1891, there was filed herein by the defendants the original writ of error in this cause, duly allowed and signed by the Honorable James M. Shackelford, judge of the United States court in the Indian Territory, and signed by William Nelson, clerk of said court, and sealed with the seal of said court.

183 Said original writ of error is the following:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judge of the United States court in the Indian Territory, in and for the first judicial division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said United States court in the Indian Territory before you, at the May term, 1891, thereof, between Ben. F. Lafayette and Sallie M. Hailey, as plaintiffs, and George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, as defendants, a manifest error hath happened, to the great damage of the said George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the

eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, within sixty days from this date, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twelfth day of September, in the year of our Lord one thousand eight hundred and ninety-one.

Seal of the United States Court Indian Territory, First Division.

Issued at office in Muscogee, Indian Territory, with the seal of the United States court for the Indian Territory and dated as aforesaid.

W. NELSON,
Clerk of the United States Court in the Indian Territory.

Allowed by—
JAMES M. SHACKELFORD,
Judge of the United States Court in the Indian Territory.

184 UNITED STATES OF AMERICA, *ss:*

Indian Territory, First Judicial Division.

In obedience to the command of the within writ I herewith transmit to the United States circuit court of appeals a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the United States court in the Indian Territory, first judicial division.

[Seal of the United States Court, Indian Territory, First Division.]

W. NELSON,
Clerk of the United States Court in the Indian Territory.

No. 765. Ben. F. Lafayette and Sallie M. Hailey *vs.* Geo. A. Eddy and H. C. Cross, receivers Missouri, Kansas and Texas railway. Writ of error. Filed Sept. 12, 1891. Wm. Nelson, clerk.

At the same time, the same being the 12th day of September, A. D. 1891, the said defendants, by their attorney, filed and lodged in the clerk's office of the United States court, in the Indian Territory, for the first judicial division, a true copy of the original writ of error, duly allowed and signed by the Honorable James M. Shackelford, judge of the United States court in the Indian Territory, and signed by Wm. Nelson, clerk of said court, and sealed with the seal of said court. Said copy of said original writ of error is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable judge of the United States court in the Indian Territory, in and for the first judicial division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the United States court in the Indian Territory, before you at the May term, 1891, thereof, between Ben. F. Lafayette and Sallie M. Hailey, as plaintiffs, and George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, as defendants, a manifest error hath happened, to the great damage of the said George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, as by their complaint appears, we being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be
185 therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States circuit court of appeals, for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of Saint Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, within sixty days from this date, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twelfth day of September, in the year of our Lord, one thousand eight hundred and ninety-one.

Issued at office in Muscogee, Indian Territory, with the
[SEAL.] seal of the United States court, for the Indian Territory, and dated as aforesaid.

WM. NELSON,
Clerk of the United States Court in the Indian Territory.

Allowed by—
JAMES M. SHACKELFORD,
Judge of the United States Court in the Indian Territory.

Indorsed: "This copy is lodged with the clerk of the United States court in the Indian Territory, first judicial division, at Muscogee, for defendant in error. Clifford L. Jackson, att'y for Geo. A. Eddy and H. C. Cross, receivers M., K. & T. R'y, plaintiffs in error. No. 765. Ben. F. Lafayette and Sallie M. Hailey *vs.* Geo. A. Eddy and H. C. Cross, receivers Missouri, Kansas & Texas railway. Writ of error. Filed Sept. 12, 1891. Wm. Nelson, clerk."

Afterwards to wit, on the same day, the same being the 12th day of September, A. D. 1891, come the defendants, by their attorney, and file herein their appeal bond.

186 Said bond is in words and figures as follows:

"UNITED STATES OF AMERICA, } ss:
Indian Territory, First Judicial Division, }

In the United States Court in the Indian Territory, First Judicial Division.

BEN. F. LAFAYETTE and SALLIE M. HAILEY, Plaintiffs, }
vs. } No. 765.
GEO. A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas & Texas Railway, Defendants. }

Know all men by these presents, that we, Clarence W. Turner, Patrick J. Byrne and Andrew W. Robb, are held and firmly bound unto Ben. F. Lafayette and Sallie M. Hailey in the full and just sum of three thousand and five hundred dollars to be paid to the said Ben. F. Lafayette and Sallie M. Hailey, their heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this tweifth day of September, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas, lately at the May term of the United States court in the Indian Territory, in and for the first judicial division thereof, in a suit depending in said court between Ben. F. Lafayette and Sallie M. Hailey, plaintiffs, and George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, defendants, judgment was rendered against the said defendants and the said Geo. A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, have obtained a writ of error in the United States circuit court of appeals, for the eighth circuit, to reverse the judgment in the aforesaid suit, and a citation directed to the said Ben. F. Lafayette and Sallie M. Hailey, citing and admonishing them and each of them, to be and appear in the United States circuit court of appeals, for the eighth circuit, at the city of Saint Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas, and Texas railway, shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make good
187 their plea, then the above obligation to be void, otherwise to remain in full force and virtue.

CLARENCE W. TURNER. [SEAL.]
PATRICK J. BYRNE. [SEAL.]
ANDREW W. ROBB. [SEAL.]

Sealed and delivered in the presence of—

——— ———.

Approved by—
JAMES M. SHACKELFORD,
Judge of the United States Court in the Indian Territory.

Indorsed: "No. 785. Ben. F. Lafayette and Sallie M. Hailey *vs.* Geo. A. Eddy and H. C. Cross, receivers Missouri, Kansas & Texas railway. Appeal bond. Filed Sep. 12, 1891. Wm. Nelson, clerk."

Afterwards, to wit, on the 14th day of September, A. D. 1891, the defendants filed herein the original citation, signed by the Honorable James M. Shackelford, judge of said court, which with indorsements is in words and figures as follows, to wit:

"United States of America to Ben. F. Lafayette and Sallie M. Hailey, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of Saint Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the United States court in the Indian Territory, at Muscogee, wherein George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable James M. Shackelford, judge of the United States court in the Indian Territory, in and for the first judicial division, this 12th day of September, A. D. 1891.

JAMES M. SHACKELFORD,
Judge of the United States Court in the Indian Territory.

We accept service of above this 14th September, 1891.

L. P. SANDELS AND
W. T. HUTCHINGS,
Att'ys for Plaintiffs."

188 Indorsed: "No. 765. Ben. F. Lafayette and Sallie M. Hailey *vs.* Geo. A. Eddy and H. C. Cross, receivers Missouri, Kansas and Texas railway. Citation. Filed Sept. 14, 1891. Wm. Nelson, clerk."

UNITED STATES OF AMERICA, *ss:*
Indian Territory, First Judicial Division.

I, William Nelson, clerk of the United States court in the Indian Territory, do hereby certify that the above and foregoing is a full, true and correct transcript of a case pending in said court, wherein Ben. F. Lafayette and Sallie M. Hailey are plaintiffs, and George A. Eddy and Harrison C. Cross, as receivers of the Missouri, Kansas and Texas railway, are defendants, as appears of record in my office.

Witness my hand and the seal of said court, at Muscogee, Indian Territory, this 14th day of October, A. D. 1891.

Seal of United States Court in the Indian Territory, First Division.

WM. NELSON, *Clerk,*
By —— ——, *Deputy.*

189 And on said nineteenth day of October, A. D. 1891, there was filed in the clerk's office of said United States circuit court of appeals in said cause an appearance of counsel for plaintiffs in error in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 189–.

GEORGE A. EDDY and H. C. CROSS, as Receivers of the Missouri, Kansas and Texas Railway, Plaintiff- in Error,
vs.
BEN. F. LAFAYETTE and SALLIE M. HAILEY, Defendants in Error. } No. —.

The clerk will enter my appearance as counsel for the plaintiffs in error.

CLIFFORD L. JACKSON.

NOTE.—Must be signed by a member of the bar of the United States circuit court of appeals. Individual and not firm names should be signed.

Endorsed: U. S. circuit court of appeals, eighth circuit, 189–, October term. No. 35. George A. Eddy & H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, pl'tiffs in error, *vs.* Ben. F. Lafayette and Sallie M. Hailey. Appearance. Filed Oct. 19, 1891. John D. Jordan, clerk. Clifford L. Jackson, counsel for plaintiffs in error.

On the thirtieth day of December, A. D. 1891, there was filed in the office of the clerk of said United States circuit court of appeals in said cause an appearance of counsel for defendants in
190 error in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, Jan'y Term, 1891.

H. C. CROSS and GEO. A. EDDY, Rec'rs M., K. & T. R'y,
vs.
LA FAYETTE & HALEY. } No. 35.

The clerk will enter my appearance as counsel for the appellees.

W. T. HUTCHINGS.
L. P. SANDELS.

NOTE.—Must be signed by a member of the bar of United States circuit court of appeals. Individual and not firm names should be signed.

Endorsed: U. S. circuit court of appeals, eighth circuit, 1891, Jan'y term. No. 35. Geo. A. Eddy *et al.*, pl'ffs in error, *vs.* Ben. F. Lafayette *et al.* Appearance. Filed Dec. 30, 1891. John D.

Jordan, clerk. L. P. Sandels, W. T. Hutchings, counsel for appellees.

On the twenty-sixth day of January, A. D. 1892, there was filed in the office of the clerk of said United States circuit court of appeals in said cause a motion for order to inspect original record in words and figures following, to wit:

In the United States Court of Appeals for the Eighth District.

GEORGE A. EDDY and H. C. CROSS, Receivers of the Missouri, Kansas and Texas Railway, Plaintiffs in Error,
vs.
191 BEN. F. LAFAYETTE and SALLIE M. HAILEY, Defendants in Error.

Come the defendants in error and represent to the court that in the trial of this cause in the United States court for the Indian Territory, held at Muscogee, Indian Territory, a notice to take depositions on the part of the plaintiffs was given and served upon defendants as required by law; that said notice was given upon a printed form, and was drawn for the purpose of having said depositions taken by agreement; that counsel for defendants declined to have said depositions taken by agreement; counsel for plaintiffs with a pen erased "some other convenient place," and purely by error failed to erase the word "or;" that a true copy of the notice so served is hereto attached and made part of this motion; that the transcript of the record in said cause as filed in this court fails to show the erasure as made, and fails to show accurately the notice as originally written and with the erasure above mentioned.

That as printed in the record the notice reads that depositions will be taken "at the office of Joseph French or in the town of Pierce City, in the State of Missouri," and hence appears vague and indefinite; that as given and as passed upon by the court below the vagueness is plainly the effect of a clerical error and not calculated to mislead the defendants.

Defendants therefore pray that this court will make an order directing the original records in this cause to be brought before it, so that the original notice as served may be inspected, and so that the transcript in this cause may be made to speak the facts.

W. T. HUTCHINGS,
SANDELS & HILL,
For Defendants in Error.

Notice to Take Depositions.

In the United States Court for the Indian Territory.

192 SALLIE HAILEY and BEN. F. LA FAYETTE, Plaintiffs,
against
GEO. A. EDDY & H. C. CROSS, Receivers of Missouri, Kansas and Texas Railway, Defendants.

To the above-named defendants:

You are hereby notified that deposition- of witnesses, to be read in evidence in the above-entitled cause on the part of the plaintiffs, will be taken at the office of Joseph French or [some other convenient place]* in the town of Pierce City, in the [county]* State of Missouri, on the 2nd day of April, 1890, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, and that the taking of said depositions, if not completed on that day, will be continued from day to day, at the same place and between the same hours, until completed.

SALLIE HAILEY AND
BEN. F. LAFAYETTE,
By SANDELS, WARNER & HUTCHINGS,
Their Att'ys.

Service of the above notice is hereby acknowledged and issue of dediums and all exceptions as to time waived.

—— —, 18—.

—— ——.

Filed January 26, 1892.

JOHN D. JORDAN, *Clerk.*

And on the twenty-sixth day of January, A. D. 1892, in the record of the proceedings of said United States circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891, January Session, 1892.

193 TUESDAY, *January* 26, 1892.

GEORGE A. EDDY and H. C. CROSS, as Receivers of the Missouri, Kansas and Texas Railway, Plaintiffs in Error,
vs.
BEN. F. LAFAYETTE and SALLIE M. HAILEY, Defendants in Error. } No. 35.

In error to the United States court in the Indian Territory.

This cause came on this day to be heard upon the motion of defendants in error to have the original notice to take depositions filed

[* Words enclosed between brackets erased in copy.]

in the said United States court produced for inspection by this court, and was argued by counsel.

Mr. L. P. Sandels appearing in behalf of said motion and Mr. C. L. Jackson *contra*, thereupon said motion was submitted to the court.

And on the twenty-seventh day of January, A. D. 1892, in the record of the proceedings of said United States circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891, January Session, 1892.

WEDNESDAY, *January* 27, 1892.

GEORGE A. EDDY *et al.*, Receivers, Plaintiffs in Error,
vs.
BEN. F. LAFAYETTE *et al.*, Defendants in Error. } No. 35.

In error to the United States court in the Indian Territory.

This cause having been submitted to the court on motion to produce the original notice to take depositions for inspection in
194 this court, and the court being now fully advised concerning the same, it is now ordered that said motion be, and the same is hereby, denied.

And on the twenty-seventh day of January, A. D. 1892, in the record of the proceedings of said United States circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891, January Session, 1892.

WEDNESDAY, *January* 27, 1892.

GEORGE A. EDDY *et al.*, Receivers, &c., Plaintiffs in Error,
vs.
BEN. F. LAFAYETTE *et al.*, Defendants in Error. } No. 35.

In error to the United States court in the Indian Territory.

This cause came on this day to be heard, and argument was commenced by Mr. C. L. Jackson, counsel for plaintiffs in error, continued by Mr. L. P. Sandels, counsel for defendants in error, and concluded by Mr. C. L. Jackson, in behalf of plaintiffs in error.

Thereupon the cause was submitted to the court upon the transcript of the record and briefs of counsel filed herein.

And on the 15th day of February, A. D. 1892, an opinion of said circuit court of appeals was filed in said cause in the words and figures following, to wit:

195 United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

GEORGE A. EDDY and H. C. CROSS, as Receivers of the Missouri, Kansas & Texas Railway, Plaintiffs in Error,
vs.
BEN. F. LAFAYETTE and SALLIE M. HAILEY, Defendants in Error.

No. 35. In Error to the United States Court in the Indian Territory.

Clifford L. Jackson, counsel for plaintiffs in error.

W. T. Hutchings and Sandels & Hill, counsel for defendants in error.

Before Caldwell, Shiras, and Thayer, JJ.

THAYER, *J.*:

This is an action to recover the value of 666 tons of hay which *was* destroyed by fire near Wagoner, in the Indian Territory, on August 20, 1889. The hay was stacked in fifteen ricks at distances varying from 400 yards to one and one-half miles from the track of the Missouri, Kansas & Texas Railway Company. Messrs. Eddy and Cross were operating said railroad as receivers when the fire occurred.

The complaint filed in the lower court alleged that they had negligently permitted large quantities of dry grass and weeds to accumulate on the railroad right of way; that they had in service a locomotive engine which was not supplied with the best appliances for arresting sparks, and that while using such engine it was carelessly permitted to emit sparks, or drop coals of fire, which ignited the combustible material on the right of way and started a fire that eventually spread to the hay ricks and destroyed them.

On the trial in the lower court the evidence showed very conclusively that the fire began on the right of way, and was most likely occasioned by a locomotive drawing a train of freight cars which had passed only a few moments before the fire was discovered,
196 and was seen to emit sparks at or very near the place where the fire originated. There was also considerable testimony tending to show that the right of way at that place, and for some distance in either direction, was covered with combustible material, such as dry grass and weeds, which grew very close to the track and was liable to become ignited.

It was further shown that the section boss in the employ of the receivers had been requested to burn the combustible material along the right of way, at that particular point, only a short time before the hay ricks were destroyed, but that he had neglected to comply with such request.

The trial resulted in a verdict against the receivers in the sum of $2,664.

The record before us shows that an unusual number of exceptions were taken to the action of the trial court.

Seventy-four errors are noted in the assignment of errors, forty of

which seem to be relied upon by counsel to secure a reversal of the cause.

It would extend this opinion to an unnecessary length, and would subserve no useful purpose, if we attempted to notice all of the errors that have been assigned. We have considered the various assignments in detail, and find many of them to be without merit. We shall confine our attention, therefore, to those specifications which seem to us to be most material and important.

The first exception that will be noticed relates to the jurisdiction of the trial court.

Process was served on the receivers by delivering a copy of the summons to one of their station agents in charge of the railway station at Muscogee, in the Indian Territory. A motion was made to quash the service, which was overruled, and an exception was duly saved.

Subsequently the receivers pleaded to the merits and went to trial, but in so doing reserved to themselves the benefit of their previous exception, so far as it was within their power to do.

On this state of facts it is contended that the lower court did not acquire jurisdiction to enter a judgment against the receivers, although it is conceded that under the laws of the State of Arkansas, which have been made applicable to the Indian Territory, such service as was had in the present case, is sufficient to confer jurisdiction, when the defendant is a railway company or a foreign corporation. Mansfield's Digest, sections 4979–4982 and section 31, act of Congress, May 2, 1890 (26 U. S. Stat., 94).

We regard this contention of counsel as untenable for two reasons.

The third section of the judiciary act of March 3, 1887 (24 U. S. Stat., 554), authorizing suits to be brought against receivers of railroads, without special leave of the court by which they are appointed, was intended, as we think, to place receivers upon the same plane with railway companies, both as respects their liability to be sued for acts done while operating a railroad, and as respects the mode of obtaining service. Such was the view entertained by the circuit judge of this circuit in the case of The Central Trust Company *vs.* The St. Louis, Arkansas & Texas Railway Company, 40 Federal Reporter, 426, and we concur in what is there said on this subject.

We are also of the opinion that the jurisdiction of the lower court may be maintained on the further ground that, by answering to the merits and going to trial after the motion to quash the
197 service of summons had been overruled, the receivers submitted to the jurisdiction of the court, and should not be permitted to question its jurisdiction in this court.

In so holding we have not overlooked the decision in Harkness *vs.* Hyde, 98 U. S., 476, but we believe that case may be fairly distinguished from the one at bar.

In Harkness *vs.* Hyde the process involved had not only been served outside of the territorial jurisdiction of the court, and within the limits of an Indian reservation, but the officer who served the

process was guilty of a violation of law in entering the reservation for that purpose.

In the case at bar the service was had at a place within the jurisdiction of the court from which the process emanated. It also had jurisdiction of the subject-matter of the suit, by virtue of the fact that the negligent acts complained of had been committed within the Indian Territory. Under these circumstances, we are unable to concede that the receivers may raise the question of jurisdiction in this court, after pleading to the merits, and entering upon a long trial in the lower court.

It is a general rule that mere defects in the service of process may be waived by an appearance, where the court has jurisdiction of the subject-matter of the controversy, and the defect in the service only impairs the jurisdiction over the person of the defendant. Such is the rule in the State of Arkansas, whose laws have been extended over the Indian Territory, and such is also the rule in other States.

St. L., I. M. & S. R'y Co. *vs.* Barnes, 35 Ark., 95.
Martin *vs.* Godwin, 34 Ark., 682.
Kronski *vs.* Mo. Pac. R'y Co., 77 Mo., 368.
Rippstein *vs.* St. L. Mut. Life Ins. Co., 57 Mo., 86.
Estill *vs.* N. Y., L. E. & W. R. R. Co., 41 Fed. Rep., 853.
R'y Co. *vs.* McBride, 141 U. S., 127.

The cases are very exceptional where a litigant is at liberty to deny the jurisdiction of a court, after defending on the merits, and taking the chances of making a successful defense precisely as if it had jurisdiction.

If the receivers desired to raise the question of jurisdiction in this court, we are of the opinion that they should have refused to appear in the lower court, or, having appeared for the purpose of moving to quash the service of process, that they should have abandoned the case when their motion to quash the service was overruled.

The next question to be considered is whether the plaintiffs below showed such a title to the hay that was destroyed as entitled them to recover its value.

It is strenuously insisted by counsel for the receivers (and this is said to be their main contention) that the plaintiffs below showed no such title as warranted a recovery, for the reason that the hay was cut on lands belonging to the Creek nation, and that both of the plaintiffs were trespassers in so doing; and, secondly, because one of the plaintiffs was a licensed trader, and as such was expressly prohibited by a local statute from cutting hay on the common pasturage grounds of the Creek nation.

It is sufficient to say, with reference to this contention, that the record before us fails to show whether the hay was cut on the
198 common pasturage of the nation, or on lands at the time occupied and held by Mrs. Hailey individually, according to the customs and usages of the nation. We will certainly not presume that either of the defendants in error were guilty of a trespass, much less that in cutting the hay either of them violated a criminal statute.

In so far as we are permitted to indulge in presumptions, we must presume that the hay was lawfully harvested. The burden is on the receivers to overcome that presumption, and we find nothing in the present record that would authorize us to say that the hay was gathered on the public domain without license, and that, for that reason, the defendants in error showed no title.

The record does disclose, and there is no evidence to the contrary, that one of the plaintiffs in the lower court (Mrs. Hailey) was a member of the Creek nation. As such she certainly held the land where the hay was harvested, as a tenant in common with other members of the Creek nation, even if it was not gathered on lands of which she was the sole occupant, according to the usages and customs of her tribe. We know of no law of the nation, nor has any such law been called to our attention, that would preclude her from cutting hay on land which she occupied in common with other members of the Creek nation.

The record further shows that the hay in question was harvested under a contract between the defendants in error, whereby Mrs. Hailey agreed to cut and bale, and also to deliver 2,000 tons of hay at Wagoner in the Indian Territory. The requisite means to enable her to fulfill the contract were to be advanced by Ben. F. Lafayette, the other defendant in error, and in consideration of the performance of the contract by Mrs. Hailey, she was to receive one-third of the net proceeds of the hay when harvested and sold.

The hay appears to have been put up in ricks, pursuant to the provisions of this contract, by persons in Mrs. Hailey's employ, and it was in her possession when the fire occurred.

Under these circumstances we are of the opinion that the defendants in error showed a sufficient title to enable them to maintain a joint action against a wrong-doer for the loss of the hay.

In this connection we will also add, that the receivers are not in a position to urge as a ground of reversal, that the contract between the defendants in error was invalid, because Mrs. Hailey was a married woman. Even if such be the fact it does not impair her title to the hay or prevent her from recovering its full value. If the position is tenable it merely shows that one of the plaintiffs below was an unnecessary party.

Mrs. Hailey has not thought proper to lay claim to the entire proceeds of the hay, on the ground that the contract between herself and the other defendant in error is not enforcible as against her by reason of her coverture, and the receivers will not be permitted to make such a plea in her behalf.

It is sufficient for their protection that all parties who have an interest in the hay have been made parties to the suit and will be concluded by the judgment.

Allen *vs.* Buffalo, 38 N. Y., 280.
Simar *vs.* Canada, 58 N. Y. 298, 301.
Miss. Planing Mill *vs.* Pres. Church, 54 Mo., 520.
Lass *vs.* Eisleben, 50 Mo., 122.
Yonley *vs.* Thompson, 30 Ark., 399.

199 A number of the exceptions taken have reference to the charge, and to the action of the trial court in refusing requests to charge, which were tendered in behalf of the receivers.

As some of these exceptions relate to the giving and refusal of instructions touching the degree of care that the parties to the suit were bound to exercise, we can best indicate our views on this branch of the case by stating the substance of the charge of the trial court on these points.

In the matter of keeping their right of way free and clear of combustible materials, and in the matter of providing their locomotives with suitable appliances so that they would not emit sparks, the trial court charged that the receivers were only called upon to exercise "reasonable care, skill and diligence;" in other words, that the law only exacted of them that degree of diligence that a prudent and skillful man would exercise under like circumstances to prevent injury to his own property.

It further instructed the jury, however, that while the receivers were not liable unless the fire was occasioned by their negligence, yet, if they had allowed combustible material to accumulate along the track which was liable to be ignited by sparks from passing engines, the jury would be authorized to impute negligence.

It further directed the jury that it was the duty of a railway company to keep its right of way clear of combustible materials, and that its failure to do so was a circumstance showing negligence; it also instructed them, in substance, that the fact that a fire had been occasioned by sparks from a passing engine was *prima facie* evidence of negligence, and that such proof would compel the receivers to show that it was not due to their fault, and that they had not been guilty of negligence.

On the other hand, the jury were advised that the plaintiffs in the lower court could not recover if by their own fault or negligence they had contributed to the burning of the hay; they were further told that if the evidence showed the existence, in the locality where the hay was stacked, of "a general and uniform custom of long standing, to plow around hay ricks or make fire-guards," they might consider that fact in determining if the plaintiffs had been guilty of contributory negligence.

Such in substance were the directions given by the trial court concerning the respective duties of the parties to the controversy.

In so far as the charge of the lower court defines the degree of care that should have been exercised in keeping their locomotives and right of way in a proper and safe condition to prevent fires, the plaintiffs in error have no cause to complain. The charge in this respect embodies the substance of several requests that were asked by the plaintiffs in error.

That portion of the charge also appears to us to have been substantially correct which related to the accumulation of combustible material along the right of way, and to the burden of proof after the origin of the fire had been shown. Negligence may properly be imputed to a railway company if it suffers combustible material to accumulate on its right of way, in such quantity, at such places,

and at such seasons as renders it liable to become ignited and cause damage to adjacent property. It is also incumbent on a railway company to show that it has used all of those reasonable
200 precautions which the law exacts, when it is proven that adjacent property has been damaged by a fire which was occasioned by sparks or cinders from a passing locomotive. The decisions to this effect are both numerous and uniform.

Shearman & Red. on Neg., sec. 676, 678, and citations.

It is contended, however, that in defining the duty of the defendants in error, the trial court should have gone further than it did, and should have declared, as it was requested to do, "that if * * * the plaintiffs did not use any effort to protect their hay, which they allege was burned by sparks cast out by defendants' engine, either by plowing around the ricks of hay in question or by making fire-guards around the same, or using other means, such as a careful, prudent person should have done, and that because of such failure to so protect said hay, that the same was burned, the jury should find for the defendants."

We think this request ought not to have been given for the following reasons:

It assumes that the evidence in the case tended to show that the defendants in error had made no effort, and had taken no precautions to protect their hay from fire, which was not the fact. The testimony showed (and there was no proof to the contrary) that the defendants in error were making hay in the immediate vicinity of the ricks when they were destroyed; that the men so employed were keeping a constant lookout for fires, and had two water wagons on the field for the express purpose of extinguishing such fires as might occur.

The request was accordingly misleading, and was properly refused in that it ignored testimony tending to show that certain reasonable precautions had been taken by the defendants in error to protect their property.

It is not claimed, nor does it appear from the record, that there was any evidence of contributory negligence, except the testimony of three or four witnesses, tending to show that it was the practice of some persons in the locality where the fire occurred, to plow around hay ricks, for the purpose of preventing fires.

The existence of any practice tantamount to a general custom was controverted by the defendants in error.

The receivers, however, requested the trial court to charge in substance, that if the proof showed "a custom to plow around hay ricks," the jury might consider that fact in determing whether the defendants in error had been guilty of such negligence as would preclude a recovery. From the tenor of the charge as above stated, it appears that the trial court granted the prayer, and charged the jury on this point substantially as the plaintiffs in error had requested it to do.

We conclude, therefore, that the receivers are not entitled to complain of the manner in which the issue as to contributory negli-

gence was submitted to the jury. In so far as the trial court dealt with that question, its charge was certainly correct; it might have directed the jury to consider whether the failure to plow around the hay ricks was not culpable negligence, irrespective of the existence of such a custom; but it was not asked to give that direction, and its failure to do so under the circumstances stated will not warrant a reversal.

There are two other assignments of error to be considered, which relate to the measure of damage.

201 The court below instructed the jury that the measure of damage was "the market value of the hay when burned, with six per cent. interest from the time it was destroyed."

This instruction is fairly subject to criticism, for the reason that it did not leave the jury any discretion to withhold or allow interest on the value of the hay.

We entertain no doubt that interest may be allowed as damages, in cases where property has been destroyed through the culpable negligence of another, as well as when it has been wrongfully converted, but the usual, and perhaps the better practice is, to leave such allowance to the discretion of the jury.

Beals *vs.* Guernsey, 8 John. Rep., 446.
Thomas *vs.* Weed, 14 John. Rep., 255.
Devereaux *vs.* Burgwin, 11 Iredell, 490.
Gilpins *vs.* Consequa, Peters, C. C., 85.
Sedg. on Dam., 7th ed., 189, 190, 191.

In the present case, however, we find no occasion to disturb the verdict on account of the error complained of, as it is quite evident from the record that the jury estimated the value of the hay at $4.00 per ton, and did not in fact award interest.

The plaintiffs in error also requested the trial court to charge the jury, "that if they found that there was a market for hay in the rick * * * in the vicinity where it was burned, then they should disregard all evidence as to the market for hay at other places."

This request the court denied in form, but charged in substance as follows: "That the measure of damages was the market value of the hay and six per cent. interest, and if there was no local market value, that the value might be fixed with reference to the market value at the nearest place where hay was sold, due allowance being made for cost of transportation, etc."

We are unable to discover any material error in this direction, or in the refusal of the receivers' request. It is evident, we think, that the jury must have understood the charge as a direction to allow the market value of the hay at Wagoner, if there was a local market value, irrespective of its value elsewhere.

There is also abundant evidence in the case to support the finding of the jury as to the value of the hay.

We have, as before stated, considered all of the exceptions taken to the action of the trial court, but have only mentioned those which appear to us to have most weight. The case seems to have been tried in the lower court with a view of saving as many excep-

tions as possible, and, in view of that fact, we cannot refrain from condemning a practice which subserves no useful purpose and imposes so much unnecessary labor on an appellate court.

The judgment of the lower court is hereby affirmed.

Filed February 15, 1892.

202 And on the fifteenth day of February, A. D. 1892, in the record of the proceedings of said United States circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891, January Session, 1892.

MONDAY, *February* 15, 1892.

GEORGE A. EDDY and H. C. CROSS, as Receivers Missouri, Kansas and Texas Railway, Plaintiffs in Error,
vs.
BEN. F. LAFAYETTE and SALLIE M. HAILEY, Defendants in Error. } No. 35.

In error to the United States court in the Indian Territory.

This cause came on to be heard on the transcript of the record from the United States court in the Indian Territory and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said United States court in this cause be, and the same is hereby, affirmed with costs, and that said Ben. F. Lafayette and Sallie M. Hailey recover against said George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, twenty dollars for their costs herein expended, and have execution therefor.

203 And on the 2nd day of May, 1892, a petition for a rehearing was filed in the office of the clerk of said United States circuit court of appeals in said cause in the following words, to wit:

The United States Circuit Court of Appeals, Eighth Circuit, October Term, A. D. 1891.

GEO. A. EDDY & H. C. CROSS, as Receivers of the Missouri, Kansas & Texas Railway, Plaintiffs in Error,
vs.
BEN. F. LAFAYETTE and SALLIE M. HAILEY, Defendants in Error. } No. 35.

Petition for Rehearing.

Now, at this day, come the above-named plaintiffs in error and respectfully present this their petition for a rehearing in this cause,

and for grounds of the same respectfully show to this honorable court:

First. This court misunderstood the record in this cause as it does show that the hay in question was cut upon the common pasturage or the public domain of the Creek nation. This fact is clearly shown by the testimony of defendant in error, Lafayette, (see printed Record, p. 97). It is also shown by the testimony of
204 different witnesses for plaintiffs below, that this hay was cut from different parts of the unfenced prairie lands, or public domain of the Creek nation, extending in distance four or five miles north and south and three or four miles east and west, and partly on the east and partly on the west sides of the M. K. & T. R'y track, and that the "Flat Rock" wagon road ran between the different ricks of hay put up by plaintiffs below, and that part of these ricks were situated south and a part north of the town of Wagoner. (See printed Record, pp. 39, 47, 51, 53, 58, 62, 69, 74 and 75.)

Defendants concede this to be the state of facts by their brief. (See Brief of Defendants in Error, pp. 7, 8 and 9.)

Second. This court erred in holding that the burden was upon plaintiffs in error to prove that defendants in error had no title to the hay or that the same was unlawfully harvested. It is respectfully submitted that on the contrary the burden was upon defendants in error, who were plaintiffs below, to have proven that they had such title to the hay as would permit them to maintain this action, in other words, that they had lawfully harvested the hay and that a recovery of damages for its loss by them would be a bar to a recovery by any other person who might claim a better right. Even had this burden properly been upon plaintiffs in error it is submitted that the evidence clearly shows that the hay was unlawfully harvested. Defendants in error admit such a showing in their brief but assert that the statute of the Creek nation is a "nullity." (See Brief of Defendant in Error, page 8.) This court should at least have found error in the action of the lower court in refusing as requested by defendants below to leave to the jury the question as to whether the hay was unlawfully harvested. (See printed Record, p. 150.)

Third. This court erred in holding that the land from which the hay in question was cut was held by one of the plaintiffs below (Mrs. Hailey) as a member of the Creek nation, as a tenant in common with the other members of the Creek nation. It is re-
205 spectfully submitted that such relation does not exist between the members of the Creek nation as to any of their lands, and the action of plaintiffs below in cutting this hay was directly opposed to the traditions, customs and policy of the Creek nation with reference to its lands, as well as the policy of the United States Government in its dealings with these people and this nation.

The parties interested in and owning this hay have not been made parties to this suit, and will not be concluded by the judgment in this case.

Fourth. This court erred in holding that there was no prejudice to plaintiffs in error in the instruction of the lower court on the

measure of damages. The verdict was general and therefore this court cannot safely undertake to say that this erroneous instruction did not affect the jury or that in arriving at their verdict that they were not controlled by it. That the conclusion of this court is wrong upon this point as a matter of fact could be successfully shown by affidavits of jurors, if it were proper to inquire into the calculation made by the jury and by means of which they arrived at their verdict.

The plaintiffs in error do not intend to waive any of the different errors of the lower court complained of by them, but only deem it necessary for the purposes of this petition to set out the grounds above mentioned.

GEO. A. EDDY AND
H. C. CROSS,
As Receivers of the Missouri, Kansas and Texas Railway, Plaintiffs in Error,
By CLIFFORD L. JACKSON,
Their Attorney.

I hereby certify that the foregoing petition for rehearing is in my opinion well founded in point of law, and that the same is not interposed for vexation or delay.

CLIFFORD L. JACKSON,
Counsel for Plaintiffs in Error.

Filed May 2, 1892.

JOHN D. JORDAN, *Clerk.*

203 And on the second day of May, A. D. 1892, in the record of the proceedings of said United States circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891, May Session, 1892.

MONDAY, *May* 2, 1892.

GEORGE A. EDDY and H. C. CROSS, as Receivers Missouri, Kansas and Texas Railway, Plaintiffs in Error,
vs.
BEN. F. LAFAYETTE and SALLIE M. HAILEY, Defendants in Error.
} No. 35.

In error to the United States court in the Indian Territory.

This day came the plaintiffs in error, by Mr. C. L. Jackson, counsel, and move the court for leave to file a petition for a rehearing herein, and, the court being advised, it was ordered that said motion be, and, the same is hereby, granted. Thereupon the said petition for a rehearing was submitted to the court without argument.

And on the fourth day of May, A. D. 1892, in the record of the proceedings of said United States circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891, May Session, 1892.

WEDNESDAY, *May* 4, 1892.

GEORGE A. EDDY *et al.*, Receivers of the Missouri, Kansas and Texas Railway, Plaintiffs in Error,
vs.
BEN. F. LAFAYETTE *et al.*, Defendants in Error. } No. 35.

207 In error to the United States court in the Indian Territory.

This cause came on to be heard upon the petition of the plaintiffs in error for a rehearing, heretofore submitted to the court; and the court having considered the same and being advised, it is ordered that the petition of said plaintiffs in error for a rehearing be, and the same is hereby, denied, and by consent of W. T. Hutchings, counsel for defendants in error, the issuance of the mandate herein is stayed for a period of thirty days from this date.

208 And on the 11th day of May, 1892, a petition for writ of error was filed in said cause by counsel for plaintiffs in error in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

GEORGE A. EDDY and H. C. CROSS, as Receivers of the Missouri, Kansas and Texas Railway, Plaintiffs in Error,
vs.
BEN. F. LAFAYETTE & SALLIE M. HAILEY, Defendants in Error. } No. 35.

Petition for Writ of Error.

To the honorable Chief Justice and associate justices of the Supreme Court of the United States:

Your petitioners, George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, plaintiffs in error in the above-entitled cause, respectfully show that said above-entitled cause is now pending in the United States circuit court of appeals for the eighth circuit, and a judgment has been therein rendered affirming a judgment of the United States court in the Indian Territory in and for the first judicial division, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs, and that the jurisdiction of none of the other courts above mentioned is dependent in anywise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different States, and that this case does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error, and

therefore your petitioners would respectfully pray that a
209 writ of error be allowed them in the above-entitled cause directing the clerk of the United States circuit court for the eighth circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by said plaintiffs in error may be reviewed and, if error be found, corrected according to the laws and customs of the United States.

GEO. A. EDDY &
H. C. CROSS,
As Receivers of the Missouri, Kansas and Texas Railway, Plaintiffs in Error,
By their attorneys, JAMES HAGERMAN AND CLIFFORD L. JACKSON.

Endorsed: No. 35. Geo. A. Eddy *et al.*, receivers, plaintiffs in error, *vs.* Ben. F. Lafayette & Sallie M. Hailey. Petition for writ of error to U. S. circuit court of appeals for the eighth circuit. Filed May 11, 1892. John D. Jordan, clerk.

210 And on the 11th day of May, 1892, an assignment of errors was filed in said cause by counsel for plaintiffs in error in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

GEO. A. EDDY and H. C. CROSS, as Receivers of the Missouri, Kansas & Texas Railway, Plaintiffs in Error,
vs.
BEN. F. LAFAYETTE and SALLIE M. HAILEY, Defendants in Error.
No. 35.

Assignment of Errors.

Now comes George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, by their attorneys, and say that in the foregoing record and proceedings there is manifest error in the action and rulings of the United States court in the Indian Territory, as well as in the action, rulings, and opinion of the United States circuit court of appeals for the eighth circuit, in this, to wit:

Said United States court in the Indian Territory erred in—

1.

Deciding it had acquired jurisdiction over defendants in this cause and in overruling defendants' motion to quash the writ of summons and return of marshal thereon.

2.

In overruling defendants' motion to quash the deposition- of W. S. Johnson, Henry White, French Godley, C. C. Keesee, P. J.

Lehnhard, J. P. Linzee, and John Manlove, and in permitting plaintiffs' counsel, against the objection of defendants' counsel, to
211 introduce in evidence and read to the jury in this case the deposition- of the above-named witnesses.

3.

In permitting the introduction of the testimony of John Abercrombie as to the rule for measuring hay put up in Arkansas, and of P. J. Lehnhard as to the rule for measuring hay put up in Kansas, and of J. P. Linzee as to the rule of measuring hay put up in Iowa, and the testimony of John Manlove as to the rule of measuring hay put up in Missouri.

4.

In permitting the introduction of the testimony of W. S. Johnson as to the measurement of the ricks of hay that were burned to go to the jury, witness having previously testified that he had not measured any of the ricks, but had measured off the ground and instructed the workmen as to the dimensions of each rick, and in permitting testimony of said witness to go to the jury as to the measurement of each rick, when witness was testifying from memoranda of measurements which were made partly by himself and partly by others.

5.

In permitting testimony of witnesses Johnson and Moses Lafayette and Ben. F. Lafayette as to the cost of bailing hay and loading same on cars to go to the jury.

6.

In permitting the testimony of Moses Lafayette, F. O. Voetler, Ed. McKenna, and W. H. McMurry as to the price of hay in Arkansas and as to the market value of hay governed by the market value of hay in Arkansas to go to the jury.

7.

In permitting plaintiffs' counsel to introduce in evidence and read to the jury a contract between the plaintiffs in this case dated May 24th, 1889, and in overruling defendants' motion to withdraw from the jury and strike from the evidence in this case such contract.

8.

In permitting plaintiff Ben. F. Lafayette to testify as to the market value of hay, based upon the market of Fort Smith and Little Rock, Arkansas; Memphis, Tenn.; New Orleans, La., and State of Georgia.

9.

In permitting the book called "hay ledger" to be intro-
212 duced in evidence and the contents thereof to be read to the jury against defendants' objection, the same showing specific

sales of hay by witness Ben. F. Lafayette at different points without the Indian Territory.

10.

In overruling defendants' motion, after plaintiffs rested their case, to strike out plaintiffs' testimony, and in permitting plaintiffs' counsel, against the objection of defendants' counsel, to amend their complaint by striking out the words "No. 63," being the words which indicated the particular engine which set out the fire in question, and in refusing to postpone the trial of this cause upon the application and motion of defendants, made after plaintiffs were permitted to so amend their complaint.

11.

In permitting counsel for plaintiffs, against objection of defendants' counsel, to offer in evidence and read to the jury the bill of sale and contract signed by Sallie M. Hailey as to sale of hay in 1888 to Ben. F. Lafayette.

12.

In refusing to direct the jury in this case to return a verdict in favor of defendants.

13.

In refusing to instruct the jury, as requested by defendants, as follows:

"The court instructs the jury that in order to find a verdict in favor of plaintiffs in this cause that you must find from the evidence in this case that the hay claimed to have been burned was the joint property of Benjamin F. Lafayette and Sallie M. Hailey."

14.

In refusing to instruct the jury, as requested by the defendants, as follows:

"The court instructs the jury that if you find from the evidence in this case that the hay claimed by the plaintiffs to have been burned by sparks cast out from the fire of one of defendants' engines was cut upon the public domain of the Creek nation and not upon land owned or possessed by plaintiff Sally M. Hailey, and that plaintiff Lafayette was a licensed trader in the Indian Territory under and by virtue of a license issued to him through the War Department of the United States Government, that plaintiffs cannot recover in this case."

213 15.

In refusing to instruct the jury, as requested by defendants, as follows:

"The court instructs the jury that if you find that at the time of the institution of this suit, and at the time the hay mentioned in plaintiffs' complaint was cut, and at the time said hay was claimed by said plaintiffs to have been burned, that George A. Eddy and

Harrison C. Cross, as receivers of the Missouri, Kansas and Texas railway, were in charge and possession of a strip of ground along the east side of the railway track of said Missouri, Kansas & Texas railway, and between said track and the place where said hay is claimed by said plaintiffs to have been burned; that said strip of ground extended along the east side of said railway immediately adjacent thereto and was one hundred feet in width, extending east from the center of the track of said railway; and if you further find from the evidence in this case that any part of the hay which you may find to have been burned from fire, set out by sparks cast out by engines on the Missouri, Kansas & Texas railway, was cut upon said strip of ground or right of way, and you are unable from the evidence in this case to determine what particular part of such hay so burned as aforesaid was cut from grass that grew upon said strip of ground or right of way of said railway, and that the hay so cut from the grass so grown upon said strip of ground or right of way was ricked in common with the other hay of plaintiffs burned at such time, and was mixed and mingled with the other hay of plaintiffs burned at such time, and that such hay so cut from such grass so grown upon the right of way of said railway was not cut by the authority or with the knowledge or consent of said receivers of said railway, then you will find that plaintiffs in so cutting such hay from grass grown upon said right of way of defendants' railway were trespassers and cannot recover for the value of the hay taken as aforesaid from the said right of way, nor for the hay which was ricked in common and mixed and mingled by these plaintiffs with such other hay of plaintiffs."

16.

In refusing to instruct the jury, as requested by defendants, as follows:

"The court instructs the jury that it was not negligence in
214 the defendants to suffer such natural accumulation of dry grass and other combustible material on the sides of its track, which was liable to and was ignited by sparks of fire from its engines, unless it was to such an extent as would not be prudent nor done by a cautious and prudent man upon his own premises if exposed to the same hazard from fire, were the combustible accumulation upon his right of way."

17.

In refusing to instruct the jury, as requested by defendants, as follows:

"The court instructs the jury that if you find from the evidence in this case that the plaintiffs did not use any effort to protect their hay, which they allege was burned by sparks cast out from defendants' engine, either by plowing around the ricks of hay in question or by making fire-guards around the same, or using other means such as a careful, prudent person would have done, and that because of such failure to so protect said hay that the same was burned, you will find for the defendants."

18.

In refusing to instruct the jury, as requested by defendants, as follows:

"The court instructs the jury that if you find in this case that it was a matter of reasonable doubt from all the evidence whether the burning of the hay complained of by the plaintiffs can be attributed to any negligence on the part of the defendants or their agents or servants, then you will find for the defendants."

19.

In refusing to instruct the jury, as requested by the defendants, as follows:

"The court instructs the jury that if you find from the evidence that there was a market for hay in the rick in the neighborhood and vicinity of where the hay in controversy was burned, that then you will disregard all testimony as to any market for hay at other places than the neighborhood and vicinity in which the hay in controversy was burned."

20.

In refusing to instruct the jury, as requested by defendants, as follows:

"The court instructs the jury that in determining in this case what was the reasonable market value of the hay in controversy that you will disregard all testimony in this case as to the
215 value of hay at places other than in the neighborhood and vicinity of where the hay in controversy was burned; also that you will disregard all testimony as to the cost of bailing, hauling, and putting hay upon the cars at any point, and will confine yourselves solely and consider only the testimony in this case upon the question of the value of such hay in the rick in the neighborhood and vicinity of where this hay was ricked at the time it was burned."

21.

In refusing to instruct the jury, as requested by defendants, as follows:

"The court instructs the jury that if you should find for the plaintiffs in this case that in arriving at the amount of damages you will consider only the testimony as to the value of such hay, and that you will not include in the amount of damages you may find interest for any sum or for any time upon such damages, but shall simply find for plaintiffs such sum as you may believe the hay burned was worth at the time and place it was burned."

22.

In refusing to instruct the jury, as requested by defendants, as follows:

"The court instructs the jury that if you find from the evidence in this case that the hay claimed by the plaintiffs to have been

burned by sparks cast out from the fire of one of defendants' engines was cut upon the public domain or open lands of the Creek nation and not upon the land owned *owned* or possessed by plaintiffs or either one or both of them, that then plaintiffs cannot recover in either case."

23.

In refusing to instruct the jury, as requested by the defendants, as follows:

"The court instructs the jury that if you find from the evidence in this case that the hay claimed by the plaintiffs to have been burned by sparks cast out from the fire of one of defendants' engines was cut upon the public domain or open lands of the Creek nation without the consent of the said Creek nation or its officers or agents, that then plaintiffs cannot recover in this action."

24.

In refusing to instruct the jury, as requested by defendants, as follows:

"The court instructs the jury that in order for plaintiff- to
216 recover in this case, even should they find that defendants were negligent in allowing and permitting dry grass and combustible material to accumulate upon defendants' right of way, and that the fire in question begun upon defendants' right of way, and thence spread to a like accumulation of grass upon the ground where plaintiffs' hay was stacked, and thence to the hay and burned it, you must further find that the negligence of defendants in that respect was greater than that of plaintiffs."

25.

In refusing to instruct the jury, as requested by defendants, as follows:

"The court instructs the jury that if you find from the evidence in this case that it was the custom of the people in the neighborhood and vicinity of where the hay of these plaintiffs was claimed to have been burned to plow around such ricks as were stacked upon the prairie or to make fire-guards around such ricks, that you may consider the fact of there being such a rule or practice or custom to so protect hay stacked or ricked upon the prairie by such plowing or such fire-guards in determining as to whether or not these plaintiffs were guilty of such negligence as directly contributed to the burning of the hay in controversy."

26.

In refusing to instruct the jury, as requested by defendants, as follows:

"The court instructs the jury that a railroad company is only bound to exercise reasonable care and diligence to prevent sparks of fire from escaping from its locomotives whiie running over its road, and in keeping its track and right of way free and clear from

combustible materials, so as to prevent injury by fire to farms and other property along its line of track. In other words, a railroad company is only required to exercise such care and diligence as a careful, prudent, and skilful man would exercise under like circumstances to prevent injury to his own property equally exposed. But the court says to the jury that in this case the defendants have adduced no evidence of their having exercised any sort of care or diligence to prevent sparks of fire from escaping from their locomotives while running the same over their road on the day named or on any other day, nor have they adduced any evidence to show that they had kept their track and right of way free and clear from combustible materials. Therefore the jury must determine
217 these questions from the other evidence in the case."

27.

In instructing the jury, as contained in paragraph 5 of said charge as follows:

"The court further instructs the jury that the defendants in the operation of their railway are only bound to exercise reasonable care, skill, and diligence in preventing the accumulation of combustible materials on their track and right of way; also in the keeping of their engines, machinery, and right of way in good repair and proper condition; also in the furnishing of engines with all the most improved inventions and appliances and provided with proper fire-escapes and approved spark-arresters to prevent the escape of sparks and fire. In this case, however, the defendants have failed to adduce any evidence on any of these requirements, and the jury will determine the questions from the other evidence in the case."

28.

In instructing the jury, as contained in paragraph 10 of said charge, as follows:

"The court instructs the jury that evidence of a railway company allowing combustible materials to accumulate upon its track and right of way which is liable to take fire from sparks escaping from passing engines and communicate it to adjacent property is sufficient to warrant the jury in imputing negligence to the company."

29.

In instructing the jury, as contained in paragraph 13 of said charge, as follows:

"The court further instructs the jury that if they shall find for the plaintiffs, then the measure of damages is the market value of the hay when burned, together with interest at six per cent. per annum from the date of the destruction of the hay."

30.

In instructing the jury, as contained in paragraph 14 of said charge, as follows:

"The court instructs the jury that where the market value cannot be fixed by the proof of the local markets it may be done by proof of value at the nearest point where similar property is bought and sold, with such addition or deduction for cost of transportation and the hazard and expense incident thereto as may be necessary to determine its actual value at the place of injury."

218 31.

In permitting plaintiffs' counsel in the closing argument to the jury to use the following language, "We have been trying for the past ten years to bring railroads under the control of the public law like other people," and in declining to instruct the jury to disregard such statement of plaintiffs' counsel.

32.

In overruling defendants' motion for new trial and in entering judgment on the verdict in this case against the defendants' objection.

And said United States circuit court of appeals for the eighth circuit erred in not reversing the judgment of the said United States court in the Indian Territory because of each several error of the latter court as to its action and rulings as to each and every one of the errors above specified.

Wherefore, and for diverse other errors apparent on the face of said record, Geo. A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, pray that said proceedings as well as the said judgment of both the said United States court in the Indian Territory and United States circuit court of appeals for the eighth district be reversed.

JAMES HAGERMAN AND
CLIFFORD L. JACKSON,
Attorneys for Plaintiff- in Error.

Endorsed: No. 35. Geo. A. Eddy *et al.*, receivers, &c., plaintiffs in error, *vs.* Ben. F. Lafayette and Sallie M. Hailey. Assignment of errors. Filed May 11, 1892. John D. Jordan, clerk.

219 And on the 18th day of June, 1892, a supersedeas bond on the writ of error was filed in said cause by counsel for plaintiffs in error in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

GEO. A. EDDY & H. C. CROSS, as Receivers of the Missouri, Kansas and Texas Railway, Plaintiffs in Error, *vs.* BEN. F. LAFAYETTE and SALLIE M. HAILEY, Defendants in Error.	No. 35. Supersedeas Bond.

Know all men by these presents that we, F. B. Severs and C. W. Turner, are held and firmly bound unto Ben. F. Lafayette and Sallie M. Hailey in the full and just sum of four thousand dollars, to be paid to the said Ben. F. Lafayette and Sallie M. Hailey, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of June, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at the October term of the United States circuit court of appeals for the eighth circuit, in a suit depending in said court between Geo. A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, as plaintiffs in error, and Ben. F. Lafayette and Sallie M. Hailey, as defendants in error, judgment was rendered against the said plaintiffs in error, and the said Geo. A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, as plaintiffs in error, have obtained a writ of error in the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a citation directed to the said Ben.
220 F. Lafayette and Sallie M. Hailey, citing and admonishing them to be and appear in the United States Supreme Court, at the city of Washington, District of Columbia, thirty days from and after the date of said citation:

Now, the conditions of the above obligation is such that if the said Geo. A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, shall prosecute said writ of error to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; otherwise to remain in full force and virtue.

F. B. SEVERS. [SEAL.]
C. W. TURNER. [SEAL.]

Sealed and delivered in the presence of—

——— ———.

Approved:
DAVID J. BREWER, *Justice.*

The above bond is satisfactory.

W. T. HUTCHINGS,
Att'y for Def't- in Error.

Endorsed: No. 35. In U. S. circuit court of appeals, eighth circuit. Geo. A. Eddy and H. C. Cross, as receivers M., K. & T. R'y, P. in E., *v.* Ben. F. Lafayette & Sallie M. Hailey, D. in E. Supersedeas bond. Filed Jun- 18, 1892. John D. Jordan, clerk.

221 And on the 9th day of June, 1892, a writ of error to said circuit court of appeals was filed in the office of the clerk of said court, the original of which is hereto attached and herewith returned.

222 UNITED STATES OF AMERICA, *ss:*

To the honorable judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals for the eighth circuit, before you or some of you, between Geo. A. Eddy & H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, plaintiffs in error, and Ben. F. Lafayette and Sallie M. Hailey, as defendants in error, said cause bearing number thirty-five, pending in said court upon writ of error from the first judicial division of the United States court in the Indian Territory, in which said cause Clarence W. Turner, Patrick J. Byrne, and Andrew W. Robb were sureties upon the supersedeas bond, a manifest error hath happened, to the great damage of the said plaintiffs in error and their said sureties upon their said supersedeas bond, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, District of Columbia, and filed in the office of the clerk of the Supreme Court of the United States within thirty days from the date hereof, to the end that, the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to
223 the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this second day of June, in the year of our Lord one thousand eight hundred and ninety-two.

Seal of the Supreme Court of the United States.

Issued at office, in the city of Washington, with the seal of the Supreme Court of the United States, and dated as aforesaid.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice Supreme Court of United States.

Return to Writ of Error.

UNITED STATES OF AMERICA, } ss:
Eighth Circuit, }

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at office, in the city of St. Paul, Minnesota, this 21st day of June, A. D. 1892.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

224 [Endorsed:] No. 35. In U. S. circuit court of appeals, eighth circuit. Geo. A. Eddy and H. C. Cross, as receivers M., K. & T. R'y, P. in E., *vs.* Ben. F. Lafayette and Sallie M. Hailey, D. in E. Writ of error. Filed Jun- 9, 1892. John D. Jordan, clerk.

225 And on the 18th day of June, 1892, a citation to defendants in error was filed in said cause, the original of which is hereto attached and herewith returned.

226 UNITED STATES OF AMERICA:

To Ben. F. Lafayette and Sallie M. Hailey, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, District of Columbia, thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the office of the United States circuit court of appeals for the eighth circuit, wherein Geo. A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, are plaintiff- in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 2d day of June, in the year of our Lord one thousand eight hundred and ninety-two.

DAVID J. BREWER,
Justice of the Supreme Court of the United States.

Service of the above citation is hereby acknowledged.

SANDELS & HILL,
W. T. HUTCHINGS,
Attorneys for Def't- in Error.

227 [Endorsed:] No. 35. In U. S. circuit court of appeals, eighth circuit. Geo. A. Eddy and H. C. Cross, as receivers M., K. & T. R'y, P. in E., *vs.* Ben. F. Lafayette and Sallie M. Hailey, D. in E. Citation. Filed Jun- 18, 1892. John D. Jordan, clerk.

228 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing pages, numbered from 1 to 227, inclusive, contains full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said court, in the case of George A. Eddy *et al.*, receivers, etc., plaintiffs in error, *vs.* Ben. F. Lafayette *et al.*, No. 35, October term, 1891, as the same remains upon the files and records of the said United States circuit court of appeals. I further certify that the original citation and writ of error are hereto attached and herewith returned with this transcript.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Paul, Minnesota, this 21st day of June, A. D. 1892.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: Case No. 15,071. U. S. circuit court of appeals, 8th circuit. Term No., 130. George A. Eddy & H. C. Cross, as receivers of the Missouri, Kansas & Texas railway, pl'ffs in error, *vs.* Ben. F. Lafayette & Sallie M. Hailey. Filed June 30, 1892.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

HENRY C. ROUSE, RECEIVER DE BONIS NON, VICE EDDY & CROSS, DECEASED, RECEIVER OF MISSOURI, KANSAS AND TEXAS RAILWAY,
PLAINTIFF IN ERROR,
vs.
BEN. F. LAFAYETTE AND SALLIE M. HAILEY,
DEFENDANTS IN ERROR.

130

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

JAMES HAGERMAN,
CLIFFORD L. JACKSON, AND
JOSEPH M. BRYSON,
Attorneys for Plaintiff in Error.

Nixon-Jones Printing Co., 215 Pine Street, St. Louis, Mo.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

HENRY C. ROUSE, RECEIVER DE BONIS NON, VICE EDDY & CROSS, DECEASED, RECEIVER OF MISSOURI, KANSAS AND TEXAS RAILWAY,
PLAINTIFF IN ERROR,

vs.

BEN. F. LAFAYETTE AND SALLIE M. HAILEY,
DEFENDANTS IN ERROR.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

STATEMENT.

We seek by this proceeding in error to reverse the judgment of the Circuit Court of Appeals for the Eighth

Circuit in affirming the judgment of the United States Court for the Indian Territory.

The judgment of the Circuit Court of Appeals is not final but is subject to review here inasmuch as the jurisdiction of the trial court did not depend at all upon the citizenship of the opposite parties to the suit. (Sec. 6 Act of Congress creating Circuit Court of Appeals, approved March 3, 1891.)

The plaintiffs below sue to recover from Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway, duly appointed by the United States Circuit Court for the District of Kansas, and which appointment was confirmed by the United States Circuit Court for the District of Arkansas, the value of 666 1-2 tons of hay which they allege were destroyed by sparks of fire and coal escaping from the smoke-stack of locomotive engine number 63 while such railway was being operated by the receivers. The petition alleges two acts of negligence: First, that the receivers permitted large quantities of combustible material (dry grass and weeds) to accumulate over and upon their railroad track and right of way near the premises of the plaintiff. Second, that on the day of the fire the receivers run their engine number 63,— which it was alleged was of unskillful and defective construction and was not supplied with the best appliances and contrivances for arresting sparks and preventing the emission of coals of fire from its smoke-stack,— over their road near the premises of the plaintiff so as to carelessly permit such engine to cast out sparks and coals of fire therefrom to the combustible material on the right of way, and set fire thereto, which spread over the land of the plaintiffs and destroyed their hay-stacks, but the petition wholly fails to allege that fire was negligently permitted to so spread. The petition also alleges plaintiff Ben F. Lafayette to be a white man residing in the Indian

Territory, and the plaintiff, Sallie M. Hailey, an Indian residing in the Indian Territory, and that the receivers were, at the time of the injury complained of, operating their railroad through the Indian Territory by virtue of the laws of the United States, having been appointed such receivers by the Circuit Court of the United States for the Eighth Judicial Circuit.

The answer of the defendants was a special denial of each and every allegation of the petition.

The receivers were not personally served with process, but the summons was served on their local station agent at Muscogee in the Indian Territory.

By the act of Congress of March, 1889, creating the United States Court for the Indian Territory as amended by the Act of May 2d, 1890, the statutes of Arkansas relating to the issuance and service of summons was made applicable to the Indian Territory. There was no law of Arkansas authorizing service of summons upon the receivers by serving their agent. The only law of Arkansas under which any claim can be made to support the service relates to service on foreign corporations, and will be set forth in a subsequent part of this brief, pp. 16–23.

The receivers specially appeared and moved to quash the summons and return, which the court overruled, and to which exception at the time was taken; and the receivers in their answer, expressly protesting against the jurisdiction of the court, and protesting that they had not been served with process, saved to themselves their exceptions to the court entertaining jurisdiction of their persons. This action of the court in refusing to quash the summons we claim to be error, and is fully separately treated, pp. 23–31.

During the progress of the trial and after all the evidence for the plaintiffs had been introduced, and after they had failed to prove that the fire in question was communicated by engine No. 63, as alleged in the petition, the plaintiffs

asked leave to amend their petition by striking out the number of the engine; and, against the protest of the receivers and their exception, the court permitted such amendment. Thereupon the receivers asked that the case be continued, and made, what we shall submit, a conclusive showing, that they were not, in view of the amendment, prepared to go on with the trial. The court refused the continuance and the receivers excepted. The facts bearing on this point, as shown by the record, are hereafter set forth, pp. 51–58.

The evidence introduced at the trial, all of which is preserved in the record, may be conceded to tend to show that the fire in question may have been caused by sparks escaping from the locomotive of some passing train of the receivers. There was not a *scintilla* of testimony showing the condition of the engine, or any negligence in the construction or operation thereof.

Upon the question of whether the fire originated on or off the right of way the testimony is vague and shadowy, and unsatisfactory. The witnesses who testified upon the question of seeing the prairie on fire shortly after one or two trains had passed were at distances of a mile or a mile and a half from the fire. The undisputed testimony shows that the track of the railroad was free from any grass or weeds, and there is some testimony tending to show that standing grass and weeds were on the right of way as high or higher than a man's knee, but no testimony showing that the grass or weeds were dry, or that they were not of the current year's growth, and such as ought to have been in that latitude at the season of the year when the fire occurred, the month of August.

From the testimony it is only conjecture where the fire originated, and whether the grass and weeds upon the right of way were burned by the fire having spread from the right of way or having spread to it. The hay-stacks

which were burned were at distances ranging from four hundred yards to one and a half miles from the railroad track.

The testimony bearing on the origin of the fire is quite fully hereafter set forth (pp. 33–36), and that touching the condition of the right of way at pp. 59–60.

Concerning the ownership of the hay, the undisputed evidence shows the hay burned was cut from an area of the public domain of the Creek Nation contiguous to and on the east side of the Missouri, Kansas and Texas Railway, and which area was about four miles long by two and a half miles wide. It was stacked in some thirty-four ricks, fifteen of which are claimed to have been burned. The hay was cut pursuant to a certain contract between the plaintiff Hailey, who was a married Creek Indian woman residing in the Creek Nation, and plaintiff Lafayette, a white man and a licensed post trader, residing in Ft. Gibson in the Cherokee Nation, whereby the plaintiff Hailey agreed to cut, bale and deliver two thousand tons of hay at Wagoner (Indian Territory), and the plaintiff Lafayette agreed to furnish all the money necessary to secure the delivery and to pay all expenses incident thereto, — she to take one-third of the profits after payment of deficiency under similar contract for the year 1888, and he the other two-thirds.

We hereafter (pp. 67–72) support by our argument the proposition that under the evidence the hay in question did not belong to plaintiffs, but was the property of the Creek Nation, and therefore the plaintiffs cannot maintain a suit for its value.

At the conclusion of the testimony the receivers asked the court to instruct the jury to return a verdict for them, which the court refused, and to which due exception was preserved; and we claim the action of the court in this respect was vital error (T. R., pp. 33–51).

The receivers also asked, among others, the following instruction, which was refused, and due exception taken, (T. R., p. 139), which action of the court we shall claim was manifestly erroneous:—

> "The court instructs the jury that if you find from the evidence in this case, that the hay claimed by the plaintiffs to have been burned by sparks cast out from the fire of one of defendants' engines, was cut upon the public domain or open lands of the Creek Nation and not upon land owned or possessed by plaintiffs or either one or both of them, that then plaintiffs cannot recover in this case."

The charge of the court is found in the record, T. R. 142–144.

The receivers specifically excepted to each and every of the following instructions or paragraphs of the charge given:—

> "The court further instructs the jury that evidence of a railway company allowing combustible materials to accumulate upon its track and right of way which is liable to take fire from sparks escaping from passing engines and communicate it to adjacent property, is sufficient to warrant the jury in imputing negligence to the company."

> "The court further instructs the jury that evidence showing that the fire originated from sparks of a passing engine is prima facie proof of negligence, and the burden shifts on the railway company to show that it was guilty of no negligence."

> "It is the duty of a railroad company to keep its right of way clear of combustible materials, and failure to do so is a circumstance showing negligence."

> "The court further instructs the jury that if they

shall find for the plaintiffs, then the measure of damages is the market value of the hay when burned, together with interest at six per cent per annum from the date of the destruction of the hay."

We shall contend that the action of the court in giving each of these instructions was erroneous.

The verdict of the jury was for the plaintiff for $2,664. While the amount involved in this case is not large, yet the questions are of importance. There has been great looseness in the admininistration of justice in the Indian Territory, and what rules of law prevail there are involved in much uncertainty. American courts of justice have only been recently established, and the Missouri, Kansas and Texas Railway Company, whom our client in this case represents, must bear the burden of the judgment eventually to be rendered, if any, and that company, in common with the other railroad companies in the Territory, which are representatives of the largest property interests, are vitally concerned to know whether the rules of law of civilized countries are to prevail.

The questions which we will present for the consideration of the court in this case are: —

I.

Did the trial court, being the United States Court for the Indian Territory, acquire jurisdiction over Eddy & Cross, receivers of the Missouri, Kansas and Texas Railway, and residents of the State of Kansas, by virtue of the summons served on one Williams, an agent of said receivers in charge of their station at Muscogee in the Indian Territory, and which summons so served did not contain any statement whatever as to the nature of the cause of action?

II.

If the court did not acquire jurisdiction over said receivers under said summons and service thereof, did the receivers waive their objection thereto, though they appeared specially for the sole purpose of asking that the summons and service thereof be quashed, by pleading to the merits and going to trial, but reserving and still insisting upon their objection to the summons and service thereof, after the court had ruled against them and those objections?

III.

Did not the trial court abuse its discretion in permitting plaintiffs to amend their petition by striking out the specific number of locomotive 63, alleged to have set out the fire, without continuing the case, notwithstanding affidavits of defendants showing they were thereby surprised and misled and in court without preparation or testimony to make any defense whatever against any other engine than engine No. 63, but that they had a complete defense as to engine 63?

IV.

Did the petition state a cause of action? The petition does not charge, nor does the proof show, that fire was by defendants negligently permitted to spread from right of way to plaintiff's hay.

V.

Did not the trial court err in not directing the jury to return a verdict in favor of the defendant at the close of the testimony, there being no evidence whatever showing

negligence in construction, maintenance or operation of any engine as alleged in petition; and further err in charging the jury that testimony simply showing that sparks were seen to escape from an engine of defendants which passed a short time before the fire, and which was all the evidence in the case as to how fire originated, raised a presumption that defendants had negligently set out the fire, and that the burden of disproving their having negligently set out the fire thereupon shifted on to them?

VI.

Did not the trial court err in charging the jury that it was negligence *per se* for defendants to allow their right of way to be and remain in the condition shown by the testimony? Should not the question as to whether or not it was negligence in the defendants to permit their right of way to be and remain in the condition shown by the testimony have been submitted to the jury?

VII.

Did not the trial court err in charging the jury, in the event they found for plaintiffs, to allow interest on value of hay found from date of fire? Should not the jury have been instructed to allow or disallow interest as they saw proper under all the circumstances of the case? In other words, was this not a question for the jury and not for the court?

VIII.

Did plaintiffs prove such title to the hay as entitled them to sue and recover for its destruction?

This case was brought here on numerous assignments of error, which were filed in this court at the time of the

allowance of the petition for writ of error, as shown in T. R. 188. Though we consider all of those assignments (32 in number) material, we only desire to press to the attention of this court the following specifications of error which cover the questions in this case above outlined, all of which we rely upon as making a reversal and remand of this case inevitable upon review.

Specifications of Error.

I.

The trial court erred in refusing to sustain defendant's motion to quash writ of summons and return of marshal thereon, and in deciding that it acquired jurisdiction of defendants by virtue of such summons and service thereof (T. R. 5).

II.

The United States Circuit Court of Appeals for the Eighth Circuit erred in deciding that the trial court acquired jurisdiction of the defendants, Eddy & Cross, by virtue of the summons and service thereof, and in holding that the trial court did not err in not sustaining defendants' motion to quash said summons and the service thereof.

III.

The United States Circuit Court of Appeals for the Eighth Circuit erred in deciding and holding that defendants waived any objections to the summons and the service thereof by pleading to the merits and going to trial, notwithstanding defendants appeared specially in the first instance for the purpose of objecting to the summons and service

thereof, and duly saved their objections thereto upon the same being overruled, and still insisting thereon upon pleading to the merits and going to trial.

IV.

The trial court erred in permitting plaintiffs' counsel to introduce in evidence and read to the jury a contract between the plaintiffs in this case dated May 24, 1889, and in overruling defendant's motion to withdraw from the jury and strike from the evidence in this case such contract, for the reason that the same was void and of no effect, not being made in accordance with Section 2103 Revised Statutes of the United States; and the United States Circuit Court of Appeals erred in not correcting this error of the trial court.

V.

The trial court erred in refusing to instruct the jury as requested by defendants as follows:—

> "The court instructs the jury that if you find from the evidence in this case that the hay claimed by the plaintiffs to have been burned by sparks cast out from the fire of one of defendant's engines was cut upon the public domain or open lands of the Creek Nation and not upon the land owned or possessed by plaintiffs, or either one or both of them, that then plaintiffs cannot recover in either case,"

and the United States Circuit Court of Appeals for the Eighth Circuit erred in not correcting this error on the part of the trial court.

VI.

The trial court erred in overruling defendant's motion, after plaintiffs rested their case, and after the plaintiffs had

been allowed, against the objection of defendants, to amend their complaint by striking out the words "Number 63," being the words which indicated the particular engine which set out the fire in question as alleged in plaintiffs' petition, to continue or postpone the trial of the cause, which application and motion of defendants therefor, was supported by affidavits showing that they were misled and surprised by such amendment, and in court without any preparation or testimony to make a defense against any other engine than engine 63, but that as to such engine 63 they had a complete defense (T. R. 91 *et seq.*). And the United States Circuit Court of Appeals for the Eighth Circuit erred in not holding that the trial court abused its discretion in permitting this amendment without granting a proper postponement or continuance of the case so as to enable the defendants to properly prepare its defense upon the new issues raised.

VII.

The trial court erred in not directing the jury to return a verdict in favor of the defendants at the end of all the testimony, for the reason that the petition did not state facts constituting a cause of action, in that the petition wholly failed to charge and the proof wholly failed to show that the fire was by defendants negligently permitted to spread from their right of way to plaintiff's hay (T. R. 132). And the United States Circuit Court of Appeals for the Eighth Circuit erred in not correcting this error.

VIII.

The trial court erred in not directing the jury to return a verdict in favor of the defendants at the close of the testimony for the reason that the testimony in the case wholly

failed to show any negligence on the part of defendants either in the construction, maintenance or operation of any of its engines, or in any other way showing that defendants negligently set out the fire, and the United States Circuit Court of Appeals for the Eighth Circuit erred in not correcting this error (T. R. 132).

IX.

The trial court erred in charging the jury as follows:—

> "The court further instructs the jury that evidence showing that the fire originated from sparks of a passing engine is prima facie proof of negligence, and the burden shifts on the Railway Company to show that it was guilty of no negligence,"

and the United States Circuit Court of Appeals for the Eighth Circuit erred in not correcting this error (T. R. 144).

X.

The trial court erred in instructing the jury as follows:—

> "The court further instructs the jury that evidence of the railway company allowing combustible materials to accumulate upon its track and right of way which is liable to take fire from sparks escaping from passing engines and communicate it to adjacent property, is sufficient to warrant the jury in imputing negligence to the company" (T. R. 144),

and the United States Circuit Court of Appeals for the Eighth Circuit erred in not correcting this error on the part of the trial court.

XI.

The trial court erred in instructing the jury as follows:—

> "It is the duty of a railroad company to keep its right of way clear of combustible materials and failure to do so is a circumstance showing negligence,"

and the United States Circuit Court of Appeals for the Eighth Circuit erred in not correcting this error.

XII.

The trial court erred in refusing to instruct the jury as requested by defendants as follows:—

> "The court instructs the jury that railroad companies are only bound to exercise reasonable judgment and care to prevent fire or sparks from escaping from the locomotives while running on their road, and in keeping their track or right of way free and clear from combustible material, so as to prevent injury by fire to farms or property along the line of their roads; and in this connection reasonable care and diligence is such care and diligence as a careful, prudent and skillful man would observe under like circumstances to prevent injury to his own property, equally exposed; and if the jury believe, from the evidence, that the defendant in this case did exercise all such reasonable care, diligence and skill to prevent injury by fire to the property of the plaintiff, that is all the law requires, and the plaintiff cannot recover,"

and the Circuit Court of Appeals erred in not correcting this error (T. R. 134).

XIII.

The trial court erred in charging the jury as follows:—

> "The court further instructs the jury that if they shall find for the plaintiffs, then the measure of damages is the market value of the hay burned together with interest at six per cent per annum from the date of the destruction of the hay." (T. R. 144.)

And the United States Circuit Court of Appeals for the Eighth Circuit erred in not correcting this error on the part of the trial court.

ARGUMENT.

I.

The trial court had no jurisdiction over the persons of defendants for the reason that the summons was insufficient in itself, and the service thereof was illegal.

On March 17, 1890, there was issued by the Clerk of United States Court for the Indian Territory a writ of summons directed to Geo. A. Eddy and H. C. Cross (T. R. 3) asfollows:—

"United States of America, }
Indian Territory. }

"The President of the United States of America to the "Marshal of the Indian Territory:—

"You are commanded to summons George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, a corporation, to answer, on the first day of the next April Term of the United States Court for the Indian Territory, being the 7th day of April, A. D. 1890, a complaint filed against them in said court by Sallie M. Hailey and Ben. F. Lafayette, and warn them that upon their failure to answer, the complaint will be taken for confessed; and you will make due return of the summons on the first day of the next April term of said court.

"Witness the Honorable James M. Shackelford, judge of said court, and the seal thereof, at Muscogee, Indian Territory, this 17th day of March, A. D. 1890.

(Seal.) "Wm. Nelson, Clerk,
"By , Deputy."

Which summons was served as shown by indorsement thereon (T. R. 3) as follows:—

> "Received this summons at 2 p. m., March 17, 1890, and I certify to having served said summons by leaving a copy thereof with J. W. Williams, the agent of the within named defendants at Muscogee, this 17th day of March, 1890.
>
> "T. B. NEEDLES, Marshal."

Afterwards on April 8, 1890, the said Eddy & Cross entered their special appearance for the purpose of filing a motion to quash the said return of the marshal and the writ of summons, for the following reasons:—

> "*First.* Because on the day alleged in said return as the day of service of said summons, to wit, on the 17th day of March, A. D. 1890, J. W. Williams, styled in the marshal's return on said writ of summons as the 'agent of the within named defendants,' was not such agent.
>
> "*Second.* Because said J. W. Williams, on said 17th day of March, A. D. 1890, was not such a person upon whom process against said George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway, could legally have been served.
>
> "*Third.* Because said return is untrue.
>
> "*Fourth.* Because said service and said return were illegally and improperly made."

Subsequently, and on the 16th day of May, 1890, the said Eddy & Cross again appeared specially for the purpose of withdrawing said motion theretofore filed to quash the return of said writ of summons, and by leave of court did so. And again appearing specially moved the court to quash the writ of summons issued on the 17th of March,

1890, and also to quash the return of the marshal on said writ of summons for the following reasons: —

"1. Because said writ of summons is improperly and illegally issued.

"2. Because the writ of summons in this cause does not show the nature of the complaint filed herein.

"3. Because no action is set forth in the writ of summons issued herein.

"4. Because said return on said writ is untrue.

"5. Because said J. W. Williams, who is designated in said return as 'The Agent of Geo. A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas railway, a corporation,' was not on the day alleged in said return as the day of the service of said summons, to wit, said 17th day of March, A. D. 1890, such agent.

"6. Because said J. W. Williams was not on said 17th day of March, 1890, such a person upon whom process against Geo. A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas railway, could legally have been served.

"7. Because said return and said service were illegally and improperly made."

And in support of said motion the affidavit of said J. W. Williams was filed May 6th, 1890, to the effect that at no time had he ever been the agent of the Missouri, Kansas and Texas Railway, a corporation, within the Indian Territory, and was not such agent on the 17th day of March, 1890, and that since the month of June, 1887, had been station agent for said Eddy & Cross, and at the time of such alleged service was such agent of said receivers Eddy & Cross; and at the same time there was filed in said cause a certified copy of the order appointing said Eddy & Cross receivers.

Said motion was then and there taken up for hearing, and the said Eddy & Cross introduced testimony showing that they were duly and legally appointed by the United States Circuit Court for the District of Kansas and for the Western District of Arkansas, prior to the institution of this cause, and were such receivers engaged in operating said railway prior to and at the time of the institution of this suit and service of writ of summons herein on J. W. Williams, agent of said receivers, and also testimony proving that J. W. Williams, upon whom writ of summons in this cause was served on March 17, 1890, was on such day station agent for such receivers at Muscogee, I. T., whereupon the court overruled said motion, and said Eddy & Cross then and there duly excepted, and in open court presented and tendered their bill of exceptions, and prayed the court that the same be allowed, signed and sealed and made a part of the record, and which was accordingly done June 30, 1890. (T. R. 5.)

THE SUMMONS WAS INSUFFICIENT.

Section thirty-one of an Act of Congress of May 2d, 1890 (26 Statute at Large, p. 94) extended over and put in force in the Indian Territory chapter one hundred and nineteen of Mansfield's Digest of the Statutes of Arkansas, of 1884, relating to pleadings and practice. Section 4968 is found in such chapter and is as follows:—

> "Sec. 4968. The summons shall be directed to the sheriff of the county, and command him to summon the defendant or defendants named therein to answer the complaint filed by the plaintiff, giving his name, at the time stated therein, under the penalty of the complaint being taken for confessed, or of the defendant being proceeded against for contempt of court on his failure to do so. The summons shall be dated the day it is issued, and signed by the clerk."

Section 7, Chapter CXVI, Revised Statutes of Arkansas, 1838, page 620, and Section 8, Chapter 126, Digest of Arkansas Statutes, 1848, page 797, are identical and as follows:—

> "The original writ, in all cases where it is not otherwise directed by law, shall be a summons, which shall charge the officer having charge of the execution thereof, to summons the defendant to be and appear in court on the return of such writ, and at a place to be specified in such writ, to answer the complaint of the plaintiff."

The term "summons" as used in these two latter sections, had received a judicial interpretation by the Supreme Court of Arkansas prior to the adoption of Section 4968 in 1869.

In the case of Renner *v.* Reed, 3 Ark. 339, decided in 1841, in which a summons similar to the one issued in this case was held bad, the court said:—

> "The 7th section Revised Statutes, page 620, declares that the original writ shall charge the officer to summon the defendant to be and appear in court on the return of such writ, to answer the complaint of the plaintiff. Under the mode of proceeding, as prescribed by statutory provisions, the declaration or petition is filed with the clerk of the court, and does not accompany the writ. It is obvious that when the party defendant is required to answer the complaint of the plaintiff, it is presumed that the nature of that complaint is set forth in the writ. Otherwise, it would be too general to meet the object of the law in requiring a notice to be given to the defendant by which he might be enabled to prepare his defense. There is no cause of action set forth, and the party is left wholly in ignorance of the nature of the party's complaint. The writ is evidently defective."

The case of Renner *v.* Reed was followed in the cases of Ellis *v.* Cossitt, 14 Arkansas, 222, decided in 1853, and Neeley *v.* Robinson, 19 Arkansas, 253, decided in 1857. Under these cases no particular form of words in the summons was necessary, nor was it required that the summons should show the form of action instituted against defendant, but it was sufficient if it informed defendant of the nature of the complaint and of the amount sought to be recovered of him. This much, however, was necessary to give the court jurisdiction over defendants.

The Statutes of Arkansas from 1838 to the present time have not defined what the "summons" was to be and have not provided a different form of the same, nor has any codifier or revisor been authorized to do so. The three cases above cited give the only definition and interpretation of that term or form of summons known in the State of Arkansas, either by legislative enactment or judicial construction.

When section 4968 was a few years afterwards adopted by the Legislature of Arkansas it is presumed that that body in using the word "summons" used it with the judicial interpretation and construction given it by the Supreme Court of that State in cases above cited, and that Congress in the Act above referred to intended to adopt the same interpretation.

Sutherland on Statutory Construction, Sec. 255;
Sedgwick on Construction of Statutory Law, 224;
Potter's Dwarris on Statutes, 274, note 4;
Grover & B. S. M. Co. *v.* Florence S. M. Co., 18 Wall. 553.

And the mere change in the language of Sec. 4968, Statutes of Arkansas, 1884, from the language of the statutes construed in the cases above cited, will not be

deemed a change in the law. Revisions naturally involved some modifications of expression to bring the laws into system and uniformity. In the interpretation of the word "summons" as found in Sec. 4968 the court should follow the construction which this word received when used in the earlier statutes of 1838 and 1848. Especially in view of the fact that the practice referred to in Renner *v.* Reed of filing the complaint in the clerk's office and not sending it with the summons still prevails. The Legislature of Arkansas, and Congress as well, will presume to know the effect that that word originally had and by using a similar expression in a similar statute of later date to intend that such term should have the same meaning.

Sutherland on Statutory Construction, Sec. 256;
Sedgwick on Construction of Statutory Law, 229.

THE SERVICE OF THE SUMMONS WAS ILLEGAL.

The return of the marshal on the writ of summons did not show that the service thereof required by the statutes then in force in the Indian Territory had been had upon defendants, and was not sufficient to give the court below jurisdiction of the defendants in this cause.

The marshal in the return certified "to having served said summons by leaving a copy thereof with J. W. Williams, the agent of the within named named defendants at Muskogee."

It is contended that service of summons issued against said receivers, who were individuals, could not be had, so as to give the court below jurisdiction of them, by leaving a copy of the writ with their agent.

Sec. 4976 Mansfield's Digest Statutes of Arkansas, extended over and put in force in the Indian Territory by Act of Congress of May 2d, 1890, is as follows:—

"Sec. 4976. The service shall be:—

"First. By delivering to the defendant a copy of the summons; or,

"Second. If he refuses to receive it, by offering a copy thereof to him; or,

"Third. By leaving a copy of such summons at the usual place of abode of the defendant with some person over the age of fifteen years."

The service in this case does not meet either of the requirements of the above section.

The only instance where the statutes in force in the Indian Territory provide for the service upon the agent of a defendant is where the defendant is a foreign corporation, and is found in Section 4982 of Mansfield's Digest, as follows:—

"Where the defendant is a foreign corporation having an agent in this State (Territory), the service may be upon such agent."

It certainly cannot be said receivers Eddy and Cross were a "foreign corporation" making service on one of their station agents service on them.

THE RECEIVERS, EDDY AND CROSS, DID NOT WAIVE THEIR OBJECTIONS TO THE SUMMONS AND THE SERVICE THEREOF BY PLEADING TO MERITS AND GOING TO TRIAL AFTER THEIR OBJECTIONS WERE OVERRULED.

The record shows that Eddy and Cross appeared specially in the first instance and moved the court to quash the summons and service thereof (T. R. 4 *et seq.*), and after the court overruled this motion and the receivers having duly saved their exceptions (T. R. 5) they answered, but in their answer (T. R. 7) still protesting that they had

not been legally served, and that the court had no jurisdiction.

The Circuit Court of Appeals in passing upon the validity of the summons and service thereof, apparently thought the action of the trial court erroneous, but held that the defendants had waived their objections to jurisdiction of court by having pleaded to the merits of the case, and by going to trial. In this the Circuit Court of Appeals was certainly in error. An attempt was made to distinguish the case at bar from Harkness *v.* Hyde, 98 U. S. 476, in which case this court expressly said:—

> "The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, or what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

In the Harkness case, process from a district court of Idaho was attempted to be served upon a defendant on an Indian reservation in that Territory. In the case at bar process from the United States Court in the Indian Territory was attempted to be served upon two citizens of the State of Kansas, and not within the Indian Territory at the

time of service, by serving summons upon an agent of theirs at Muscogee, Indian Territory, in charge of their local station at that point. The distinction attempted to be drawn by the Circuit Court of Appeals between the Harkness case and the case at bar, is shown by the following excerpt from its opinion: —

> "In Harkness *v.* Hyde the process involved had not only been served outside of the territorial jurisdiction of the court and within the limits of an Indian reservation, but the officer who served the process was guilty of a violation of law in entering the reservation for that purpose. In the case at bar the service was had at a place within the jurisdiction of the court from which the process emanated. It also had jurisdiction of the subject-matter of the suit by virtue of the fact that the negligent acts complained of had been committed within the Indian Territory. Under these circumstances we are unable to concede that the receiver may raise the question of jurisdiction in this court after pleading to the merits and entering upon a long trial in the lower court."

The court in support of this holding cites Arkansas, Missouri and Federal cases. The two Arkansas cases were cited by the court for the reason that the laws of Arkansas have been extended over the Indian Territory, and as we suppose, it was considered to be the duty of the Federal courts to follow the practice of the courts of Arkansas in construing their statutes. It is respectfully submitted, however, that the two Arkansas cases, viz.: St. Louis, Iron Mountain & Southern Ry. Co. *v.* Barnes, 35 Ark. 95, Martin *v.* Godwin, 34 Ark. 682, do not sustain the contention of the Circuit Court of Appeals. What the Supreme Court of Arkansas in Railroad *v.* Barnes did decide was this: —

> "An appearance of a defendant by an attorney and

> consenting to a continuance of a cause is a substantial act and dispenses with the service of process."

And what the Supreme Court of Arkansas decided in Martin *v.* Godwin was this:—

> "A defendant cannot avail himself in the Supreme Court of a defective writ of service of the summons against him where he appeared in the Circuit Court and made no objection to the return there;"

and in the opinion in that case the Supreme Court of Arkansas made use of the following language:—

> "It is bad practice to allow the objection here in such case for the first time. It should have been made in the court below."

It will be seen that the Supreme Court of Arkansas by these cases only decided that where a defendant makes a general appearance or does some substantial act involving the merits of the case, or fails to make objection to defective return of service of summons before pleading to the merits, he cannot afterwards raise the question on appeal. We are aware of the fact that in different State courts different rules obtain as to this question, but the general rule is, as stated in the Encyclopaedia of Pleading and Practice, Vol. II, p. 629, Title "Appearances," viz.:—

> "Where a special appearance is made in order to object to illegality in the service of process, or to urge any objection for which a special appearance is appropriate, such special appearance is not waived and converted into a general one by answering to the merits after the objections are erroneously overruled. It is only where the defendant pleads in the first instance to the merits, without any special appearance, that objections to personal jurisdiction are waived."

A *special appearance* is one made for the purpose of urging jurisdictional objections. *Id.*, page 620.

Generally speaking, any plea or proceeding which raises questions non-jurisdictional and involving the merits is a *general appearance*. *Id.*, 632.

The Circuit Court of Appeals in support of its decision also cites Railway Co. *v.* McBride, 141 U. S. 127, but that case only involved the exemption of a corporation from suit in any other district than that of its incorporation, where this court simply decided that in a case like that a defendant corporation by appearing generally or by answering to the merits of the action without first objecting to jurisdiction waived such right, not deciding, however, what has since been decided by this court in a similar case, that if objection is first made before pleading to merits and going to trial such objection is not waived and may be raised on appeal. In Southern Pacific Co. *v.* Denton, 146 U. S., it is said:—

> "It may be assumed that the exemption from being sued in any other district might be waived by the corporation, by appearing generally, or by answering to the merits of the action, without first objecting to the jurisdiction. St. Louis & San Francisco Railway *v.* McBride, 141 U. S. 127; Texas & Pacific Railway *v.* Cox, 145 U. S. 593. But in the present case there was no such waiver. The want of jurisdiction, being apparent on the face of the petition, might be taken advantage of by demurrer, and no plea in abatement was necessary. Coal Co. *v.* Blatchford, 11 Wall. 172. The defendant did file a demurrer, for the special and single purpose of objecting to the jurisdiction, and it was only after that demurrer had been overruled, and the defendant had excepted to the overruling thereof, that an answer to the merits was filed. Neither the special appearance for the purpose of objecting to the jurisdiction, nor the answer to the merits after that objection had been overruled, was a waiver of the ob-

jection. The case is within the principle of Harkness *v.* Hyde, in which Mr. Justice Field, speaking for this court, said: 'Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled; and the defendant is thereby compelled to answer. He is not considered as abandoning his objection, because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived.''

We respectfully submit that this Denton case effectually disposes of all attempts to distinguish the case at bar from Harkness *v.* Hyde. And further on this question see Mexican Central Railway Company *v.* Pinkney, 149 U. S. 194. We might well contend, if it were necessary, that even though the rule in Arkansas was as stated by the Circuit Court of Appeals, yet this court and the United States Court in the Indian Territory are not bound by the practice in the Supreme Court of Arkansas. Mexican Central Railway Company *v.* Pinkney, 149 U. S. 194.

We have said that the Circuit Court of Appeals considered that these two errors were properly assigned, for the reason that a greater part of that court's opinion upon these errors was devoted to an attempt to show that the defendants had waived them by pleading to the merits and going to trial. The Circuit Court of Appeals, however, did refer to the case of the Central Trust Company *v.* St. Louis A. & T. Ry. Co., 40 Fed. Rep. 426, as tending to sustain the validity of the service of process upon the agent of these defendants. A most cursory reading, however, of that case will at once show that the opinion there is mere *obiter* here. That case did not involve the validity of service of process already made upon an agent of a

receiver of a railway, but only asked an order of the court appointing the receivers of the St. Louis, A. & T. Railway, permitting service of process upon local agents in Arkansas of the receivers of that road, the receivers themselves residing in St. Louis, Missouri. The facts in that case, as stated by the court itself, were:—

> "The defendant company owned and operated a railway beginning in Missouri and running across the State of Arkansas into Texas. On a bill for foreclosure filed by the trustees of the mortgage bondholders in the Eastern District of Missouri, a receiver was appointed, and upon a like bill filed in this district (Eastern District of Arkansas) the same person was appointed receiver in this district, and afterwards a second receiver was appointed to act jointly with the first. The receivers established their office in St. Louis, Missouri. Complaint was made to the court in Arkansas that persons having claims against the receivers which they refused to allow were prevented from establishing the justness of their claims by suit in the State courts because personal service of summons could not be had on the receivers, and the validity of service on their station agents was disputed."

On this condition of affairs Judge Caldwell simply made an order reciting that as it appeared that the receivers had established their offices in St. Louis, "and that they can- "not be personally served with process against them by "the courts of this State, that service on their agents shall "be good," etc. Evidently if such service, in the mind of the court deciding that case, was good, no such order as was made would have been made, as it would have been useless. It is true that it appears from the opinion of Judge Caldwell in that case, that it was his own belief that under the spirit of sections 2 and 3 of the Act of Congress of 1887 concerning the operation of railways by receivers appointed by Federal courts, and suits against them, ser-

vice of summons upon such receivers' agents ought to be permitted. We believe, however, that act was passed without reference to the mode of procedure against receivers, and only sought to place receivers of railways under the dominion of the State so far as the valid laws of the various States through which the railway ran prescribing their duties and liabilities were concerned, and allowing them to be sued without previous leave of the court appointing them.

Sections 2 and 3 of that Act read as follows:—

§ 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed, but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

II.

The Petition Does not Allege Facts Constituting a Cause of Action.

The allegation in petition is that defendants "carelessly permitted said engine to cast out sparks and coals of fire therefrom into the dry grass and other combustible material on defendants' right of way and set fire thereto *which spread onto and over the said land of the plaintiff*."

Not only does the evidence wholly fail to show that fire originated on *right of way*, but even if it did and the proof so show, yet the *petition fails to allege* that fire was *negligently permitted to spread from right of way to plaintiff's hay*. The petition did not state a cause of action.

In

L. N. A. & C. R. R. *v.* Ehlert, 11 A. & E. R. R. Cas. 62 (Ind.),

Judge Elliott upon petition for rehearing said: "The authorities are unusually harmonious in holding that the complaint must do more than show that the defendant, in cases like this, negligently set fire to his own property, it must also show that he negligently caused or suffered it to be communicated to the property of the plaintiff."

And in

Ind. B. & W. R. R. *v.* Adamson, 13 A. and E. R. R. Cas. 456,

it is said:—

"Where in an action against a railroad company for an injury to plaintiffs' property by fire which is alleged to have

been caused by the spreading of fire negligently kindled by sparks from the defendants' locomotives on the defendant's right of way it is absolutely essential that the complaint should allege negligence in permitting the fire to spread from the right of way to the plaintiff's land."

To same effect is

P. C. & St. L. *v.* Hixon, 79 Ind. 111.

The reason is palpable — plaintiffs cannot complain if defendants fire their own property — it is only when they negligently permit it to extend to plaintiffs' land that they can complain.

Even though defendants did negligently set out the fire yet it was set out on their own *right of way*. If it had never *spread to* plaintiffs' hay they could not have complained. The wrong dated, if at all, from the time defendants permitted fire, so set out, to spread to plaintiffs' hay. Suppose the sparks which were emitted had set the train on fire by igniting cotton on board, and from thence it had been communicated to plaintiff's hay? Would not the deciding question be, did defendants negligently permit the fire to spread to plaintiffs' hay, and not the question how came the cotton to be ignited? Defendants had a perfect right to burn their right of way. In fact plaintiffs complain because they had not previously exercised that right. Plaintiffs should have alleged and proven either that defendants *negligently* permitted the fire to *spread* or that its spreading was a natural or probable result of setting it out.

The petition failing to state a cause of action and the proof failing to support the necessary absent allegation the court should have directed a verdict for defendant.

III.

The court erred in not directing the jury at close of the evidence to return a verdict for defendant; and further erred in charging the jury that evidence simply showing that the fire originated a short time after a train of receivers passed and that sparks were seen escaping from the engine of such train was prima facie proof that the receivers had negligently set out the fire and that the burden of disproving their having negligently set out the fire was thereupon cast upon the receivers.

The testimony as to how and where the fire originated was as follows: —

PETER FRAZIER (T. R. 37) said: "From three to five mintutes after the train went north I saw the smoke." * * *

On cross-examination this witness said (T. R. 40): "I did not state I saw the engine drop the fire, but saw the fire start from three to five minutes after the train passed." This witness testified that he was about a half a mile away when the fire started.

W. T. HUTCHINGS' testimony was to this effect (T. R. 45): —

"Do you know how and where the fire started? A. I saw where it started from but never saw it start.

Q. How near to the M. K. & T. Railroad did this fire burn? A. Right close to it in places some three or four feet of the ties.

Q. How far were you working from the railroad at the time of the fire? A. About a mile and a half."

And on cross-examination (T. R. 47): —

"Q. Do you know what was the cause of the fire? A. A freight train passed just about the time the fire started, and I suppose that it was started —

Q. Did you see more than one freight train pass about that time? A. Yes, one went into Wagoner and one went out of Wagoner about the same time.

Q. Which train was it started the fire? A. I think it was the one going north. I saw the fire soon after it passed on.

Q. Did you see any fire before that? A. No.

Q. How do you know the fire started on the right of way? A. It was burned up to the road and the wind was driving it right away."

GEORGE WIRTH (T. R. 50): —

"Q. About the time of the fire did you see a freight train running on the M. K. & T.? A. Yes, sir; I saw a freight train running north. I saw no other train about that time."

W. S. JOHNSON (T. R. 54): —

"Q. Were you present when a fire is said to have occurred at that point during the summer of 1889? If so, what date was it, and give the circumstances attending the origin of the fire? A. I was present on the hay-field when the fire originated or broke out. It occurred on the 20th day of August, 1889. Owing to the constant danger of fire and the large amount of hay we had at stake, we kept two water wagons on the hay field, and kept a constant look-out for fire. About two o'clock of the evening of August

20, 1889, a freight train on defendant's line of railway passed the hay-field going north from Wagoner. We could see sparks flying from the smoke-stack of defendant's engine. A few minutes after the train had passed smoke was seen, and the alarm of fire was given." * * *

It was midday. All these parties were from one-half to one and one-half miles distant, yet this witness says: "We could see sparks flying." Certainly their eyes were telescopic, or the sparks meteoric. Does any sane man believe they could see "sparks" much less know they were *live* and not *dead*.

FRENCH GODLEY (T. R. 58): —

"Q. Just state the circumstances attending the fire that evening? A. About two o'clock on that day I was working on a rick over next to the creek. I saw a freight train going north on the M. K. & T. Railroad. In a few minutes I heard Billy Naves call to Mr. Johnson that there was a fire. I looked and saw a fire on the right of way. * * *

"Q. Did you notice the engines on the M. K. & T. Railroad when you were at work near the railroad as to whether they generally cast off sparks, or whether they did occasionally? A. I noticed the engines, and when they were going up the heavy grade north they always cast sparks."

HENRY WHITE (T. R. 59): —

Q. Where were you when this fire is said to have occurred? A. I was at the camp and saw the freight train on the M. K. & T. R. R. going north. It was going up grade. It seemed to be pulling very hard and threw out a terrible smoke. Soon after the train passed I saw the smoke on the right of way. It kept getting bigger and bigger. It looked to me as though the grass caught near the second hay-rick. * * *

It is shown by witness Peter Frazier (T. R. 42), that the rick closest to the M. K. & T. Railway was about three or four hundred yards from the railway or a little over an eighth of a mile, whereas the petition alleges and the answer admits that right of way was only 200 feet wide, — 100 feet on each side of center of track.

This is all the testimony upon the two questions: How did the fire originate, and where did it originate, — and all from witnesses of plaintiffs. There was no evidence as to size of sparks, their quality — how far they were thrown, how long they lived, or the danger of their setting out fires.

Admitting for the present that this evidence does show the fire complained of was started by sparks of fire from an engine of the defendants, and certainly the evidence under no interpretation goes further, does a presumption of negligence arise? In other words, in a case like this where plaintiff simply shows that a fire is set out by a railway company, does a presumption of negligence arise and the burden of proof shift upon the railway company to relieve itself from this presumption of negligence by showing that it exercised all proper care in the construction and operation of its locomotives? The court not only refused to instruct the jury to return a verdict for the defendants after the evidence was all in but charged the jury as follows:—

> "Instruction 12. The Court further instructs the jury that evidence showing that the fire originated from sparks of a passing engine is a *prima facie* proof of negligence, and the burden shifts on the railway company to show that it was guilty of no negligence."

This question has never been squarely presented to this court nor determined by this court. We are free to admit that there is a conflict of authority upon the question, but the decided weight of authority is that the plaintiff must

not only show that the fire was set out by the railway, but go further and show some circumstance of negligence in its setting out.

Pierce on Railroads, p. 437, says:—

> "As negligence is the gist of the action against the company for injuries received from it while exercising its lawful right to conduct its trains, the burden of proof is on the plaintiff to prove negligence. The fact of injury suffered by the plaintiff in consequence of the exercise of a right by the defendant does not raise the presumption of negligence except in some peculiar cases, as in actions against inn-keepers and common carriers, which are made exceptions to the general rules on grounds of public policy. Hence, the setting on fire of grass, fences or buildings of land owners on a railroad by particles of fire which are proved to have issued from the company's engines does not of itself justify the inference of negligence."

To the same effect is Redfield on Railways, 3 ed., 454.

On this question Wharton, in his learned treatise on the law of negligence, Sec. 869, says:—

> "This is an essential industry. You are authorized to engage in it; and as it is necessary that your engines should be driven by fire and steam you are authorized to use fire and steam in your engines. Such being the case, the mere fact of the company emitting sparks from its engines is not negligence unless it be proved that the sparks were negligently emitted."

And in support of his text cites:—

Flynn *v.* San Francisco R. R., 40 Cal. 14;
Rood *v.* R. R., 18 Barb. 80;
Reading R. R. *v.* Yeiser, 8 Penn St. 366;

Frank *v.* Railroad, 54 *Id.* 345;
Jefferis *v.* P. W. & B. R. R., 3 Hous. 447;
Baltimore & O. R. R. *v.* Woodruff, 4 Md. 242;
Borroughs *v.* Housatonic R. R., 15 Conn. 124;
2 Am. R. R. Cases, 30;
Sheldon *v.* Railroad, 14 N. Y. 218;
Vaughan *v.* Taffvale R. Co., 5 H. & N. 679;
Hammersmith &c. R. Co. *v.* Grand L. R., 4 H. L. 171, 201–2.

And in Section 870, this author says: —

> "Undoubtedly there are cases (some under local statutes) to the effect that where the plaintiff shows that his property caught fire from the defendant's engine, the burden is on the defendant to disprove negligence. This no doubt is law as to unchartered companies. When, however, a company is chartered, and thereby lawfully uses fire in its engines, the true doctrine is that it rests on the plaintiff suing it for fire communicated from its engines to show negligence in the company."

And in support of this text the author cites cases in Pennsylvania, New Jersey, Connecticut, New York, South Carolina, Georgia, Iowa, Indiana, Kansas, 4 West. Jur. 333, 5 Amer. Law Review, 208, and Aldridge *v.* Railroad, 3 M. & G. 515.

In a note in 2 Am. & Eng. R. R. Cases, 276, the conflicting authorities are collected on this question, and the result stated that

> "The weight of authority, at least in this country, is to the contrary, and the plaintiff is obliged to go further and prove some positive act of negligence, or at least something from which it may be inferred, as the defective construction of the engine, the unusual size of the sparks, the uncommon and improper velocity of the train, or like."

In the following States it has been held that no presumption of negligence arises upon the plaintiff simply showing that fire was set out by an engine, and that the plaintiff must go further and show some act of negligence in the construction or operation of the engine: Iowa, New York, Georgia, California, Pennsylvania, New Jersey, North Carolina, Indiana, Kansas, Connecticut, Ohio, Delaware, Florida, Maine, Louisiana, Vermont. In some of these States the rule has been changed by statutes, some of the statutes making the setting out of the fire *prima facie* evidence of negligence, and others making the railway company absolutely liable regardless of negligence. All of these statutes, therefore, are legislative evidences of the true rule as it existed before the enactment thereof. See

Gandy *v.* Chicago R. R. Co., 30 Ia. 419;
Sheldon *v.* Hudson River R. R. Co., 14 N. Y. 218;
Macon R. R. Co. *v.* McConnell, 27 Ga. 481;
Hull *v.* Sacramento, etc., R. R. Co., 14 Cal. 387;
Pa. R. R. Co. *v.* Yerger, 73 Pa. St. 121;
M. & E. R. R. *v.* State, 36 N. J. Law, 553;
Indianapolis R. R. Co. *v.* Paramore, 31 Ind. 143;
Kansas Pacific R. R. *v.* Butts, 7 Kansas, 308;
Borroughs *v.* Housatonic R. R. Co., 15 Conn. 127;
Jefferis *v.* Philadelphia, etc., R. R. Co., 3 Hous. 447;
Ruffner *v.* Cincinnati R. R. Co., 34 Ohio St. 96;
Ellis *v.* Portsmouth, etc., R. R. Co., 2 Ired. 138;
Jacksonville T. & K. W. Ry. *v.* Manufacturing Co., 49 A. & E. R. R. Cas. 603;
Henderson & Hull *v.* P. & R. R. R. Co., 48 A. & E R. R. Cas. 16 (1891);
Edington *v.* L. N. O. & T. Ry., 41 La. An. 96;
Lawney *v.* New Brunswick Ry., 78 Me. 479;
Lyndsay *v.* C. & P. R. R. Co., 27 Vt. 643.

> "In cases of loss by fire set out by an engine upon a railroad and involving the question of negligence, the mere fact of the injury does not amount to proof of negligence or wrong upon the part of the company. Such proof of setting out the fire or escape thereof from the property of the company is but one stage toward making out a case for recovery. The circumstances and facts relied upon as negligence are also to be proven and are to be proven by the plaintiff. To recover he must aver negligence on the part of the company as also ordinary care on his part. To recover, the burden of proof is on him to prove what he thus necessarily avers."

2 Rorer on Railroads, p. 796.

This interesting question was very recently (1891) for the first time before the Supreme Court of Florida, in the case of Jacksonville, Tampa & Key West Railroad Company *v.* Peninsular Land, Transportation and Manufacturing Company, 49 American & English R. R. Cases, 603, where it was exhaustively and learnedly considered, it being decided that —

> "The mere emission of sparks from a locomotive, or the setting out of fires thereby, is not per se evidence of negligence on the part of a railroad company."

And after citing various authorities, including Wharton on Negligence, Sherman and Redfield on Negligence, Pierce on Railroads, Redfield on Railroads, and Rorer on Railroads, in support of that holding, adds:—

> "The fact that no instrument has yet been found which entirely prevents the escape of sparks from locomotives seems, when coupled with the fact that the use of these engines is both lawful and eminently useful, a sound reason for the view that the mere

> emission of sparks or the simple setting out of fires thereby is not per se evidence of negligence, and will not throw upon the defendant the burden of removing such presumption."

This is one of the most cogent and forceful reasons assigned by any of the cases why no presumption of negligence should arise on the mere proof that sparks escaped. The impossibility to prevent the escape of sparks from locomotives by the use of the utmost diligence and care has been the prime reason for the enactment by various States of laws making railway companies liable for fires regardless of negligence, and the validity of these laws has been upheld as police regulations for the very reason that experience has shown that it was impossible in the operation of railways by the use of the utmost care to prevent the escape of sparks. In Moxley *v.* Railroad, 32 Am. & Eng. R. R. Cas. 306, the court said:—

> "We have been accustomed to take it to be a fact so well established as to be judicially recognized that no spark-arresting contrivance which can be used will altogether prevent the escape of sparks capable of setting fire to combustible matter."

This is an opinion by the Upper Court of Canada; and further along in the opinion the court added that this fact had been judicially noticed both in England and in that Province in numerous cases, and citing them.

In Jennings *v.* Pennsylvania R. R. Co., 93 Pa. St. 340, the court said:—

> "To hold that the fact of the fire having taken place was *prima facie* evidence that the spark arrester was defective, and therefore the case ought to have been submitted to the jury, would be practically to

> hold railroad companies liable for all fires, for it is notorious that no spark arrester has yet been invented to prevent all sparks, and a little spark may kindle as large a conflagration as a large one, it depending very much on the dryness or humidity of the atmosphere whether the spark will go out before reaching the ground and whether what it reaches is in a condition to be easily ignited."

Let it be conceded that it is the duty of a railroad company to provide its locomotives with proper contrivance for the prevention of the escape of sparks, yet the law presumes that every one performs his duty, and when the courts take judicial notice of the fact that no contrivance has been found that will effectually prevent the escape of sparks how, we ask, can any presumption of negligence arise by mere proof of the fact that sparks have escaped? The mainstay of those cases which hold that such a presumption of negligence does arise is usually this: That the facts in the case with reference to construction and management of engine are in the possession of the railway company, and it should divulge the same, and failing to do so its silence raises an inference of negligence. This position, however, is very effectually disposed of in another able opinion of the Supreme Court of Florida, in the case of Savanna, Florida & Western Railway Company *v.* Geiger, 21 Fla. 669, in the following language:—

> "Where the burden is put by the pleadings upon the plaintiff there is no rule of law that the defendant's failure to produce witnesses upon trial or his silence there as to what he may know can be taken to make a *prima facie* case for the plaintiff. Where the plaintiff's evidence is insufficient, the defendant may demur to it successfuly. The fact that witnesses to an occurrence are in the employ of a railroad company imposes upon it no more duty to produce them or their

> evidence at the trial than their being employed by an individual would impose upon him. The rules of evidence permitting proof by admissions — silence, where an act has been specifically charged in conversation against a defendant — has never been extended to a defendant preserving silence in court until a prima facie case has been made by the plaintiff's evidence on trial. Under our rules of evidence by which as a general rule neither interest nor being a party to the record disqualifies from testifying, the fact that it was in the power of the defendant alone to explain, and he failed to do it, is not tenable as a principle upon which to support the ruling in Danner's case, if it ever was. One party can make a witness of the other."

So in the case at bar, the plaintiffs were in a position to bring into court any employes of the defendants they might have seen fit. They knew the time the fire occurred,— could have easily ascertained the parties operating the trains complained of, and secured their attendance at court or their testimony by deposition. In fact easier then defendants. If trains do throw sparks, they pass on and it is not known to the company possibly for weeks or months that a fire was set out. Plaintiffs likewise could have secured the testimony of those employes of the defendants having in charge the repair and maintenance of all engines running upon the road. We submit that it is not right that the cost of proving plaintiffs' case should be thrown upon defendants. All witnesses were quite as accessible to plaintiffs as defendants. Besides, by statutes in nearly every State the records and papers of railways can be required brought into court at instance of plaintiffs.

In Matthews *v.* St. L. & F. Ry. Co., 121 Mo. 298, involving the constitutionality of a statute of that State making railway companies absolutely liable for all damages resulting from fires set out by locomotives regardless of negligence, the court among other things said: —

> "When it was demonstrated that although the railroads exercised every precaution in the construction of their engines, the choice of their operatives and clearing their rights of way of all combustibles, *still* fire was emitted from their engines and citizens' property burned notwithstanding his efforts to extinguish it, and notwithstanding he had in no way contributed to setting it out, it is perfectly competent for the State to require the company who set out the fire to pay his damages."

As we have before stated it is thus seen that the constitutionality of such acts has been expressly upheld upon the very ground that however careful a railway company may be in the construction of its locomotives, and however prudent in the selection of its operatives in running the locomotives, and clearing the right of way of combustibles, fires still occur. We again ask, under such circumstances how can the mere setting out a fire raise a presumption of negligence?

In The Nitro-Glycerine Case, 15 Wallace, 537, this court says:—

> "No one is responsible for injuries resulting from unavoidable accident, while engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant, by his act or by his omission, has violated some duty incumbent upon him, which has caused the injury complained of.
>
> "The cases between passengers and carriers for injuries stand upon a different footing. The contract of the carrier being to carry safely, the proof of the injury usually establishes a prima facie case, which the carrier must overcome. His contract is shown, prima facie at least, to have been violated by the injury. Outside of these cases, in which a positive obligation is cast upon the carrier to perform safely a special

service, the presumption is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances, and if he has not, the plaintiff must prove it.

"Here no such proof was made, and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer as his misfortune.

"This principle is recognized and affirmed in a great variety of cases — in cases where fire originating in one man's building has extended to and destroyed the property of others; *in cases where injuries have been caused by fire ignited by sparks from steamboats or locomotives*, or caused by horses running away, or by blasting rocks, and in numerous other cases which will readily occur to every one. The rule deducible from them is, that the measure of care against accident, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own.

"And the principle is not changed whether the injury complained of follows directly or remotely from the act or conduct of the party. The direct or remote consequences of the act or conduct may determine the form of the action, whether it shall be case or trespass, where the forms of the common law are in use, but cannot alter the principle upon which liability is enforced or avoided. In Brown *v.* Kendall, which was before the Supreme Court of Massachusetts, the action was in trespass for an assault and battery. The defendant was trying to part two dogs, fighting, and in raising his stick for that purpose accidentally struck the plaintiff in his eye, injuring it severely. The court, Mr. Chief Justice Shaw delivering the opinion, held that the defendant was doing a lawful and proper act, which he might do by the use of proper and safe means; and that if in so doing, and while using due care and taking all proper precautions necessary to the exigency of the case to avoid hurt to others, the injury

to the plaintiff occurred, the defendant was not liable therefor, and that the burden of proof was on the plaintiff to establish a want of due care on the part of the defendant. In Harvey *v.* Dunlap, which was before the Supreme Court of New York, the action was trespass for throwing a stone at the plaintiff's daughter, by which her eye was put out. It did not appear that the injury was inflicted by design or carelessness, but on the contrary that it was accidental, and it was held that the plaintiff could not recover. 'No case or principle can be found,' said Mr. Justice Nelson, in denying a new trial, 'or, if found, can be maintained, subjecting an individual to liability for an act done without fault on his part;' and in this conclusion we all agree."

THE ENGLISH DOCTRINE.

Several text-writers in treating this question, and some collocaters in arranging the various decisions on the question, place the English courts upon the side that the setting out of a fire does raise a presumption of negligence against the railway, upon the decisions in Aldridge *v.* Great Western R. Co., 3 M. & G. 515, Piggott *v.* Eastern, etc., R. Co., 3 C. B. 229, the first of which was decided in the fifth year of the reign of Queen Victoria, and the latter in the ninth, and both were heard before the same judges, the opinions being by Tindal and Maule. A careful reading, however, of these two decisions will show that the point was not expressly decided, for in both cases these courts said that it was for the jury to decide. It could not have been decided in the latter case, because the evidence introduced by the defendant showed that no spark arrester or cap whatever was used, the defense introducing evidence to the effect that such arrester or cap interfered with the proper operation of the locomotive, and upon this question there was conflict of testimony. In addition to this the

plaintiff introduced testimony to the effect that if an engine was not overworked it would not throw out sparks, and further that the danger arising from the emission of sparks might be entirely prevented by shutting off steam on passing dangerous spots. Upon this conflict of evidence the jury found for the plaintiffs, and the court refused to disturb its verdict. Indeed, Wharton in his work on Negligence cites Aldridge *v.* Great Western R. Co. in support of his text, to the effect that there is no presumption of negligence. *Supra*. He also, in same section, cites to same effect a case in House of Lords.

That this is the correct analysis of the English doctrine see Smith *v.* Hannibal & St. Joe R. R. Co., 37 Mo. 296, where Judge Holmes, one of the ablest jurists that ever sat upon the Supreme Bench of that State, in giving the united judgment of that court upon this question, says:—

> "It seems to be supposed that a different rule prevails in England, which is rather to be preferred on the score of justice and good policy. (Redf. Railw. 257.) Upon examination of the authorities we do not find any satisfactory ground for this distinction. In Aldridge *v.* Great Western R. R. Co., 3 M. & G. 515, the court merely refused to nonsuit the plaintiff on the case made, and it was distinctly intimated that negligence was no more to be presumed from the mere fact of a fire set by sparks than from the fact that a rick of beans was placed near the railroad, and that 'to enable the plaintiff to recover he must show some carelessness, or lay facts before the jury from which it may be inferred.' In other cases there was strong proof of actual negligence, as in overtasking the engine and running it without any kind of spark arresters, though such inventions were then in use (Piggot *v.* Eastern Counties R. R. Co., 3 C. B. 229; Hammon *v.* Southeastern R. R. Co., Maidst. Assiz. 1845; Walf. Railw. 182 n. e.)."

It is perhaps proper to here add that while the decision of the Supreme Court of Missouri in this case was that there is no legal presumption of negligence against the railroad company when it is simply shown that the fire was set out by escaping sparks, a number of years afterward, and after this court had changed, the Supreme Court of that State adopted the contrary doctrine *ex necessitate rei*, as appears by its decision in Catron *v.* Nichols, 81 Mo. 80, and not because the court had misinterpreted the English rule. In Catron *v.* Nichols, 82 Mo. 80, an action against an individual for spread of fire, the court said: "The general rule is that he who alleges negligence must prove it and the destruction by fire does not raise a presumption of negligence either in the kindling or management of the fire. An exception to this rule has been made in this and many other States in the case of fires caused by sparks emitted from locomotive engines by reason of the difficulty of proving in most cases the identity of the passing engine which caused the fire and the consequent inability of the plaintiff to prove its equipment and management at the time of the injury and because of the declared presumption that fires will not escape from engines properly equipped and carefully managed." Neither of these reasons are longer recognized.

That the burden in proving every material fact upon which a case primarily depends is always upon the plaintiff, is elementary law. That as to such facts, this burden remains upon the plaintiff throughout the entire case, and does not shift upon the defendant even upon the establishment of a prima facie case by the plaintiff, is capable of equal demonstration. We are well aware of the fact that there are many cases involving the liability of common carriers where the mere fact of an injury suffered by a shipper is regarded as a prima facie case of liability, but those cases are peculiar to themselves, arising out of contract, and

by reason of the law which makes common carriers insurers. In the case at bar, negligence is a material question of fact and not of law, a substantive fact to be alleged and proven. It is no more to be presumed than any other essential fact, for it is the very foundation and gist of liability. It is not to be deduced or inferred from facts which are equally consistent with its existence or non-existence. If there be any legal presumption on the subject, it would seem to be rather against its existence, since every one is presumed, in the absence of evidence, to do his full duty, and not to violate his neighbor's rights; and so far as presumptions of fact are concerned, they are mere arguments at best, and are only such as warrant a jury in inferring the fact of negligence from the other facts proved in the ordinary course of reasoning, according to the natural and proper relations of things, and the common sense and experience of mankind (1 Greenl. Ev., Secs. 44–48). But we believe we have conclusively shown that the common sense and experience of mankind has not demonstrated that negligence is always the cause of the escape of sparks from locomotives, but that they do escape even though the utmost care and diligence be exercised by the railway. This is not a case of *res ipsa loquitur*, as contended by some, and falling within the doctrine of the "barrel of flour case," Byrne *v.* Bodle, 2 H. &. C. 722. That doctrine is only applicable where the cause of the injury is one which in the ordinary and usual course of things does not happen except as the result of negligence. Upon this question see the exhaustive dissertation, 5 Amer. Law. Rev. 205. This article also strongly states and supports the rule that there is no legal presumption of negligence from the fact that a fire is set out by a passing locomotive. *Id.*, p. 208. The rule is that the mere happening of an accident never raises a presumption of negligence, and that negligence is never to be presumed

but must be proven. This is decided by all the courts. There are, as we have stated, exceptions, as in the case of common carriers, but even the law of carriers furnishes an apt illustration of the general doctrine of burden of proof, for it is well settled that if the carrier makes a special contract exempting himself from liability in certain cases, as, for instance, that he would not be liable for leakage, and a loss does happen from leakage, he may nevertheless be liable if such leakage was owing to his negligence (2 C. B. N. S. 156), but the burden of proving such negligence is clearly upon the plaintiff, and not on the carrier to disprove it. See

Zech *v.* General Steam Nav. Co., Law Rep., 3 C. P. 14.

Such has been the law since the decision of Harris *v.* Packwood, 3 Taunt. 64, and is the law of this court, though the excepted cause be fire.

N. J. Steam Nav. Co. *v.* Bank, 6 How. 344;
Transportation Co. *v.* Downer, 11 Wal. 129;
Clark *v.* Bornwell, 12 How. 272.

In Instruction 12, not only did the court charge the jury that evidence showing that the fire originated from sparks from a passing engine was prima facie proof of negligence, but the court further in this instruction said: Upon such prima facie case being made "the burden shifts on the railway company to show that it was guilty of no negligence."

As we have before stated, the burden is upon the plaintiff to prove all the substantive allegations in his petition, and even though the setting out of the fire by defendants made a prima facie case for him, yet it by no means follows that the burden of proof shifted upon the defendan ts

The distinction between burden of proof and prima facie evidence is the same in cases of negligence as in any other. The one is a fixed legal principle,— the other a mere question of the weight of evidence. They differ as much as the words *onus* and *pondus* differ. The burden of proof, when the term is properly understood, as to any fact, never shifts from that party on whom it lies at the outset. It belongs to the plaintiff as to all facts on which his case primarily rests, and it remains there until the case is finally closed. The burden of producing preponderating evidence as to the cause of this fire was upon the plaintiffs all the while, and if at the close of the trial the evidence on that point had been exactly in equilibrium, the plaintiffs would have failed to sustain their burden. Is the general rule that the burden is on him who alleges a fact to prove it a fleeting, a changing one, depending upon the question of whether the plaintiff offers much or little evidence, or the defendant none at all? The weight of evidence may shift, but the burden of proof does not upon the introduction of prima facie evidence (Tourtellot *v.* Rosebrook, 11 Metc. 460). When we speak of "a prima facie case" we simply mean that a case is made to go to the jury. The jury may or may not on such a case find for plaintiff.

IV.

The trial court abused its discretion in permitting plaintiffs to amend their petition without granting defendants' application for a continuance.

It is proper at this point to again specially call the attention of this court to the fact that plaintiffs in their petition specifically alleged that

> "Defendants were operating and running over its road an engine No. 63 which was of unskillful and

> defective construction and was not supplied with the best appliances and contrivances for resisting sparks and preventing the emission of coals of fire from its smoke stack, and on the said day the servants, agents and employes of said defendants, in operating and running said engine over said line of road near the premises of the plaintiff Sallie M. Hailey in said Indian Territory, negligently and carelessly permitted said engine to cast out sparks and coals of fire therefrom into the dry grass and other combustible material on defendants' right of way, and set fire thereto, which spread unto and over the land of the plaintiff."

As we have already shown there was an entire failure on the part of the plaintiffs to prove either of these specific allegations, *i. e.*, that the fire was set out by defendant's engine No. 63 by reason of defective construction thereof, or its unskillful operation, or that the fire originated upon the right of way of the defendants; and (T. R. 90) counsel for defendants accordingly moved the court to strike out all the testimony introduced in the case on the part of plaintiffs for the reason that there was an absolute and fatal variance between the evidence and the complaint. Upon this motion the court then and there said: —

> "Unless the plaintiffs knew the number of the engine there was no necessity to name it. The question in the case is whether an engine burned the hay. But the plaintiffs having alleged a certain engine, naming the engine, I think the defendants have a right to prepare to defend against that engine; as counsel states that he is willing to make affidavit to that effect I will allow him to do so and let the cause be continued, and allow you to amend."

Whereupon counsel for defendants withdrew and prepared a written motion to strike out plaintiff's testimony, and affidavits in support of said motion, as directed by the

court, and shortly thereafter filed the same (T. R. 91, 2, 3, 4).

The motion to strike out testimony of plaintiffs was to this effect: "That there is a material variation between the said proof and the allegations in the plaintiffs' complaint in this, that said complaint alleges that said engine No. 63 mentioned in said complaint set out the fire complained of in plaintiffs' complaint and occasioned the damage for which plaintiffs now sue; whereas, the evidence in this case does not show that said engine No. 63 mentioned in plaintiffs' complaint was the engine which set out the fire that occasioned the damage of which plaintiffs in their complaint complain; and that because of such variance between plaintiffs' complaint and plaintiffs' evidence in this cause these defendants are greatly misled and surprised and are unable to meet the state of facts made by plaintiffs' proof in this case, but respectfully show to the Court that they are able to meet the state of facts made by plaintiffs' complaint, and are prepared at this time to go on with the said trial if plaintiffs be required to prove the facts as alleged in their said complaint."

And in support of this motion the affidavits of C. L. Jackson and Wm. H. Brehm were filed. This motion was overruled and plaintiffs granted leave to amend, by striking out words "No. 63," to all of which defendants objected (T. R. 95), and thereupon moved the court to postpone the case for such reasonable time as would enable them to meet allegations of petition as they stood after such amendment.

The affidavits in support of this motion were made by C. L. Jackson, attorney for defendants, and by William H. Brehm, general foreman of the machine shops of defendants at Parsons, Kansas. The affidavit of C. L. Jackson was to the effect that in preparing the defense in this case he had relied upon the allegations in plaintiffs'

complaint that the engine which set out the fire complained of was engine No. 63, and accordingly had made his investigations and arranged his defense so as to be able to meet the allegations that that engine had set out the fire, but was not ready, because of his reliance upon the allegations of the petition, to meet the case as made by the proofs, and that "the defendants in this cause are surprised at such variance between plaintiffs' complaint and plaintiffs' proof in this cause, and state to the court that they cannot prepare at the present term of this court to defend this cause against the proof of plaintiffs' in this cause," and that by such specific allegations as to the cause of the fire in which plaintiffs apparently relied upon, the defendants had been misled and had made no investigation as to any other engine running on the road at the time and place complained of, and were therefore wholly unable to defend against any other engine. The affidavit of Brehm was to the effect that he was foreman of defendants' machine shops in the town of Parsons, Kansas, and that engine No. 63 was, on the day of the fire, in said shops undergoing repairs, and was not in the Indian Territory. Notwithstanding, however, these two affidavits in support of the motion showing distinctly that defendants had been misled as to plaintiffs' true cause of action and were wholly without evidence to meet the case as made, and which was wholly different from the cause of action alleged in plaintiffs' petition, and not withstanding the court's previous ruling that "plaintiffs having alleged a certain engine, naming the engine, I think the defendants have the right to prepare to defend against that engine (and) as counsel states that he is willing to make affidavit to that effect, I will allow him to do so and let the cause be continued" — the court, after a brief adjournment, heard argument upon defendants' motion to strike out, and overruled said motion, and over the objection of defendants in

so ruling, and upon the request of plaintiffs' counsel, permitted the said plaintiffs' counsel to amend their complaint by striking out the words "number 63," thus converting the petition into a general charge of negligence against all engines of defendants, and stating a cause of action entirely different from the one originally stated, and which the defendants relied upon and were prepared to meet, which was done over the objection of these defendants; and the court further refused to order a postponement of the cause to such reasonable time as would enable counsel for defendants to prepare to meet the cause of action after such amendment, notwithstanding the court had previously stated that defendants would be entitled to such postponement, as they had a right to rely upon the allegations of the petition and prepare their proof and evidence to meet the allegations of the petition, which was that the fire had been set out by engine No. 63 and notwithstanding said affidavits showing they were surprised and misled.

While we are entirely aware of the fact that the action of the lower court in passing upon amendments is a subject generally within the discretion of the lower court, and not subject to review here, yet we submit that this was such an abuse of judicial discretion as calls for correction here.

The statutes of Arkansas governing the amendment of pleadings in this regard and which were extended over Indian Territory by Act of May 2, 1890, are Sections 5075, 5080 and 5085, which read as follows: —

> "Sec. 5075. No variance between the allegation in a pleading and the proof is to be deemed material, *unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.* Whenever it is alleged that a party has been so misled, that fact must be shown to the satisfaction of the court, and it must also be shown in what respect he has been misled; and thereupon the court may

order the pleading to be amended upon such terms as may be just."

"Sec. 5080. The court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; *or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved.*"

"Sec. 5085. When either party shall amend any pleading or proceeding, *and the court shall be satisfied by affidavit or otherwise, that the adverse party could not be ready for trial in consequence thereof, a continuance may be granted* to some day in the same term, or to another term of the court."

Under these statutes the Supreme Court of Arkansas reviews the actions of lower courts in permitting amendments, and reverses cases where it appears that the lower court has abused its discretion.

Burke *v.* Snell, 42 Ark. 57;
Caldwell *v.* Meshew, 53 Ark. 263;
Atkinson *v.* Cox, 54 Ark. 444.

This court follows the State practice in this regard. Henderson *v.* L. & N. Railroad, 123 U. S. 61. This court has also decided that it will review the action of the lower court in permitting amendments where the defendant is taken by surprise or deprived of the benefit of any defense, or put to any disadvantage on account thereof, or where the amendment materially changes the substance of the case as originally stated, and to which the parties have directed their proof.

Richmond *v.* Irons, 121 U. S. 46;

Hardin *v.* Boyd, 113 U. S. 756;
Isaacs *v.* U. S., 159 U. S. 487.

The hardship of the action of court in permitting the amendment and the disadvantages under which it placed the defendants are seen throughout the case. In the first place the court in its charge to the jury continually commented upon the fact that defendants had not introduced any evidence to contradict the evidence of plaintiffs, or to show the condition in which its engines running over the road at the time and place in question were or how they were operated, and further charged the jury that in the absence of such proof they would have to determine their verdict from the other evidence in the case. That court further charged the jury, which we claim was erroneous in any case and especially in this case, that evidence "showing that the fire originated from sparks from a passing engine is prima facie proof of negligence, and the burden shifts on the railway company to show that it is guilty of no negligence." How was the court justified in commenting upon the absence of any evidence on the part of the defendants as to the construction of their various engines or the operation of the same other than engine 63? The defendants were misled or intentionally deceived as to the cause of action which would be relied upon at the trial, and the petition changed in such a way as to effectually preclude any defense whatever being made at the time. The investigation which defendants had made and the testimony which they were prepared to introduce making a complete defense as against the petition, became unavailing when the petition was amended as it was, and when so amended the defendants were in court and forced to trial without any evidence at hand whatever to meet the case as made by the amended petition. Yet this want of testimony on the part of defendants, as we have said, was con-

tinually commented on in the charge of the court to the jury, and in such a way as to lead the jury to believe that such absence of testimony was admission of guilt. We are also aware of the fact that while it is not necessary for a plaintiff to specifically charge in his petition the number of the engine which is relied upon as setting out the fire, yet we submit that he has a right to do so, and having done so must be held to the allegations of his petition, or only allowed to amend upon such terms as will be just to the railway company.

One of the plaintiffs in this case (T. R. 95) on the very day after the fire presented a claim to defendants' account of this fire, and in that claim stated that the engine which set out the fire was engine No. 63. It will thus be seen that from first to last the plaintiffs contended that this fire was set out by engine No. 63. They so stated in their original claim and so alleged in their petition, and upon the allegations of the petition put in all their evidence, and not until after all their evidence was in and the court ready to hear the defense did the plaintiffs recede from the original claim and the allegations of their petition that the fire was set out by engine 63. On this state of facts were not defendants entitled in the preparation of their defense to make their investigation and arrange their defense as against engine No. 63? And was it right to permit plaintiffs to amend their petition charging negligence generally in the construction of all engines and the operation of the same, as was done, and require the defendants to at once proceed notwithstanding their showing of having been surprised and misled, and wholly without evidence to meet the petition as amended? As we have seen, the lower court at first said it was not, but afterwards, in its wisdom, that it was.

V.

The trial court erred in giving paragraphs X and XII of its charge to the jury, whereby the court told the jury that the action of the receivers in allowing their right of way and track to be and remain in condition shown by testimony was negligence per se.

The testimony as to condition of right of way and track was substantially as follows:—

Witness W. T. Hutchings said (T. R. 46): "I noticed grass all along the right of way. They had not cut any grass along that right of way only up between the ties."

Witness Wirth said (T. R. 51): "Yes, sir, I saw awful high grass and weeds.

Q. Did the grass and weeds on the right of way extend to the track? A. Yes, sir, they commenced right on the track."

W. S. Johnson (T. R. 54) said: The right of way "was neither burned nor cleaned off, but the wild grass grew over the right of way and extending nearly up to the ties of the track.

Q. About what was the height of the grass upon the right of way? A. It was from knee high to waist high, and some places higher."

Henry White said (T. R. 59): "There was grass and weeds all over the right of way from knee high up, and some places as high as my head."

F. B. RUSSELL testified that numerous herds of cattle roamed over the place in question and that by burning right of way off new green grass came up and cattle were attracted thereto in such numbers as greatly impeded the operation of trains and increased the dangers of life and limb of employes and passengers. (T. R. 116).

That was all the testimony on the question as to whether or not defendants were negligent in the matter of allowing combustible material to be and accumulate upon their right of way. The evidence shows the track and road-bed to end of ties was clean. There was nothing to show that any witness knew how wide the right of way actually was, but there was evidence showing that it was not fenced, and nothing to mark its width and that witnesses understanding was that right of way was only 50 feet wide (T. R. 46). The evidence shows that whatever was on the right of way was standing and not cut, and it being the 20th of August, the court would be justified in judicially knowing that it was green (Floyd *v.* Ricks, 14 Ark. 286; Wetzel *v.* Kelly, 83 Ala. 440; Randan *v.* R. R. 69 Ia. 5277). In other words, there was no evidence showing that it was dry and combustible, that is in the sense that it was liable to be ignited by sparks. There was no evidence that any other fires had been set out in that community by engines of defendants, though there was evidence to the effect that engines passing over the point in question, which was a heavy grade, had been seen throwing out sparks generally. There was no evidence showing condition of weather and atmosphere. We have heretofore shown that the evidence in this case, under no reasonable interpretation thereof, locates the fire as having originated upon the right of way. The only witness who locates its origin with any certainty whatever was Henry White who said "it looked to me as though the grass

caught somewhere near the second hay-rick;" and it was shown, as we have stated, by another witness, that the rick nearest to the railroad track was three or four hundred yards from the track, or a little over an eighth of a mile. No witness testified that he knew width of right of way, though some of them spoke in a general way about the fire having started on or near the right of way. There was evidence that the fire burned up to three or four feet from the railroad track, but that may have been, and very probably was, the result of back fire, because sparks from smoke stack do not fall that close to the track. This fact certainly showed that track was clean.

Upon this evidence as to the condition of the right of way, the court charged the jury as follows:—

X.

"The court further instructs the jury that evidence of the railway company allowing combustible materials to accumulate upon its track and right of way, which is liable to take fire from sparks escaping from passing engines and communicate it to adjacent property, is sufficient to warrant the jury in imputing negligence to the company.

XII.

"It is the duty of a railway company to keep its right of way clear of combustible material, and failure to do so is a circumstance showing negligence."

On another branch of the case the court instructed the jury as we have before shown, that evidence showing that the fire originated from sparks from a passing engine is *prima facie* proof of negligence, and the burden shifts on

the railway company to show that there was no negligence. We contend that instructions ten and twelve are erroneous, for the reason that they assume that there was evidence showing that combustible material had been allowed to accumulate upon the *track* and *right of way*, when in fact all the evidence shows that the *track* had been cleaned to the end of the ties, and that there was no evidence whatever that the grass and weeds which were on the right of way were dry or combustible in the sense that they would ignite from contact with sparks as alleged in the petition. It is no answer to this contention that it was shown that after the fire these weeds and grass on the right of way were burned. Anything will burn almost when subjected to enough heat. These weeds and grass on the right of way coming in contact with a blaze from contiguous burning hay, or dry stubble, is one thing, and their being placed in contact with sparks is another thing. "Absolutely fireproof hotels" will burn but not from sparks. We further contend that the evidence does not show that the fire originated on the right of way, and therefore the condition of the right of way was a question wholly outside of the case. Moreover, there is a direct conflict between these two instructions ten and twelve and the other instruction we have referred to to the effect that evidence showing that the fire originated from sparks from a passing engine is *prima facie* proof of negligence, and that the burden shifts on the railway company to show that it was guilty of no negligence. This latter instruction proceeds upon the theory that if a locomotive is properly constructed and rightfully handled no sparks will escape, which is an unwarranted assumption. But if this were true, how can it be negligence on the part of a railway company to allow combustible material to accumulate on the right of way, because if it performs its duty as outlined by this instruction no sparks will escape, and it becomes a matter of no importance what

ever whether it allows combustible material to be on the right of way. In other words this instruction neutralizes the other two. If it be negligent to allow combustible material to accumulate upon the right of way it must be because, however well the locomotive be constructed, or however skillfully it be operated, sparks will escape; and therefore instruction eleven is erroneous, which says that the mere escape of sparks from a passing engine is *prima facie* proof of negligence. On the other hand, if instruction eleven is right, that the escape of sparks from a passing engine is a *prima facie* proof of negligence, then the useless burden and expense should not be imposed upon the railway company of cleaning its right of way, because that instruction proceeds upon the theory that the communication of fire from a locomotive can, in all cases, by the exercise of proper care and diligence in the construction and operation of engines, be prevented. But waiving all of these questions, the two instructions, ten and twelve, are inherently wrong because the court declares to the jury, as a matter of law, that the allowing of combustible material to accumulate upon its track and right of way is negligence *per se*, and we submit that under all authority of reason and reason of authority this question, under all the circumstances and facts, must be submitted to the jury; that is, the jury must be permitted to say whether or not combustible material of such quality and such extent was allowed to accumulate upon the right of way as would amount to negligence, under all circumstances in evidence.

What we have before said with reference to the court's action in permitting the plaintiffs to amend their petition by striking out the allegation that the fire was occasioned by engine 63, thus converting the petition into a complaint that the fire was set out by *an* engine, and requiring the defendants to go to trial without preparation as to the

new cause of action, applies to this branch of the case. Defendants had a right to rely upon the allegations of the petition, and to make their investigations and prepare their defense accordingly, and having prepared a complete defense to the allegations of the petition as originally made, and which was complete in itself without reference to the condition of the right of way, the court's action in permitting the amendment, and requiring the defendants to proceed, precluded the defendants from offering any evidence whatever upon the condition of the right of way. There was evidence introduced by the defendants, however, to the effect that the road running through an open prairie as it did, and over which numerous herds of cattle roamed at will, it was a dangerous course to burn off the right of way, as it would result in new grass growing up, and the cattle being drawn to it for pasture in such numbers that the operation of trains would be greatly impeded, and risk and hazard to life of passengers and employes greatly increased. Upon this condition of testimony: That the track and road-bed to the end of the ties was clean, no evidence as to the width of the right of way, but that grass and weeds were growing up to the ends of the ties, but no evidence to show they extended to limits of right-of-way, no evidence that this grass and weeds were dry and combustible in the sense that they were liable to be ignited by sparks, uncontradicted testimony showing danger to life and limb and the impediment in the operation of trains that would result from the burning of the right of way,— the court virtually took all of this testimony from the jury and declared as a matter of law upon that state of testimony that the company was guilty of negligence. It should have been submitted to the jury by proper instructions, such as requested by the defendants (T R. 134), to say whether or not the defendants were guilty of negligence in

permitting the material testified to, to be and remain upon the right of way under all the circumstances shown to exist, and in determining that question to be governed by the care and prudence which an ordinarily prudent man, under the same circumstances, would have acted. Upon this question there is, so far as we can find, no conflict of authority whatever, but all the cases are to the effect that it must be submitted to the jury.

Mr. Justice Brewer, while upon the Supreme Bench of Kansas, in White *v.* Missouri Pacific Ry. Co., 13 Am. & Eng. R. R. Cases, 473, in deciding a case involving this question, said: —

> "Now, while it may be conceded that permitting dry grass and stubble to accumulate on its right of way is not negligence per se (R. R. Co. *v.* Butts, 7 Kas. 314), yet the accumulation may be to such an extent, at such a season of the year, and in such proximity to the track, that a jury would be justified in holding the company guilty of negligence. In the case of Kessee *v.* R. R. Co., 30 Iowa, 78, the court laid down this rule: 'To allow the dry grass, weeds, and other combustible matter, the natural accumulations of the soil, to remain on the right of way is not negligence per se, but there may be such peculiar or unusual circumstances in a given case as to amount to negligence in fact; and when such circumstances exist, they are proper to be submitted to a jury for the purpose of establishing the fact of negligence.' And we think it is generally true that, when the evidence shows an accumulation of dry grass and stubble, it is a question of fact for the jury whether the accumulation is such and under such circumstances as to impute negligence. Here, by the statement, not only was the natural growth of grass on the right of way standing in places in rank stools, but, further, in a dry ditch was an accumulation of tumble weeds and other like matter. This was in the fall of the year at a very dry time, and whether the accumulation at such time and

under such circumstances was sufficient to charge negligence upon the company, is a question which the jury should have been permitted to pass upon. Kellogg *v.* R. R. Co., 26 Wis. 235; Flinn *v.* R. R. Co., 40 Cal. 141; R. R. Co. *v.* Shanefelt, 47 Ill. 497; R. R. Co. *v.* Nunn, 51 Ill. 78; Barron *v.* Eldridge, 100 Mass. 455; Webb *v.* R. R. Co., 49 N. Y. 420; Snider *v.* R. R. Co., 11 W. Va. 14; 38 Amer. Dec. 72 and cases cited."

In Gibbons *v.* Wisconsin Valley R. Co., 13 Am. & Eng. R. R. Cases, 469, the Supreme Court of Wisconsin say: —

"But we do hold unhesitatingly that it is a question of fact for the jury whether, in any particular place, it was negligence to so leave such material on or near the track on the grounds of the company, liable to be ignited by the sparks emitted by engines; and such we regard the weight of authority, as well as the effect of the decision, of this court. It is not per se, or as a question of law, negligence, but a question of fact to be determined by the jury in any given case. Pierce, R. R. 434; Shear. & R. Neg. 404; O. & M. R. Co. *v.* Shanefelt, 47 Ill. 497; 1 Redf. Ry. 477, and notes; Smith *v.* L. & S. W. Ry. Co., L. R. 5 C. Pl. 98; Karsen *v.* M. & St. P. Ry. Co., 29 Minn. 12; *s. c.* 7 Am. & Eng. R. R. Cas. 501; Toledo, etc., Ry. Co. *v.* Wand, 48 Ind. 476; B. & M. R. R. *v.* Westover, 4 Neb. 268; P., C. & St. L. R. Co. *v.* Nelson, 51 Ind. 150; Kansas Pac. R. Co. *v.* Butts, 7 Kan. 308."

To the same effect see

Benson *v.* Gulf, C. & S. F. R. Co. (Texas), 32 Am. & Eng. R. Cas. 332;
Kessee *v.* Railroad, 30 Ia. 80;
Bass *v.* Railroad, 28 Ill. 90;
Del. &c. R. *v.* Salmon, 30 N. J. 299;
Perry *v.* Southern Pac. R. Co. 40 Cal. 14;

Troxler *v.* Richmond &c R. Co., 74 N. C. 377;
Snider *v.* Pittsburg &c. R. Co., 11 W. Va. 14;
Jones *v.* Michigan Central R. Co., 59 Mich. 437.

Numerous cases hold it to be negligence to allow salt to remain on track where cattle may be attracted on railway by it and injured. Some States make it a penal offense to put salt on railroad track where cattle may be attracted and injured. Is it not equally dangerous in an open country where thousands of cattle are roaming to burn off right of way when fresh green grass will spring up proving an equally strong attraction? Was it not a question for the jury?

Charge of the court XII, makes it the duty of a railway to keep its right of way absolutely *clear* of combustible material. This is certainly not the law; so plainly not law, that we shall not argue it.

VI.

The plaintiffs, nor either of them, showed such title to the hay destroyed as entitled them to recover its value.

The petition simply alleges that the defendants negligently set out a fire "which spread onto and over the said land of the plaintiff." There is no allegation in the petition definitely alleging the scope or boundaries of such land except that it is alleged that the railroad of defendants was "near the premises of the plaintiff Sallie M. Hailey," and further "that plaintiff Sallie M. Hailey and Ben F. Lafayette were jointly putting up, curing," etc., "and had cut, cured and put — large quantities of hay for sale, * * * and said fire catching as aforesaid on defendant's right of

way spread rapidly onto the premises of said plaintiff Hailey and to the hay of said plaintiff." It is not even alleged that it was cut from the premises of the plaintiffs. Not only do the allegations of the petition wholly fail to show where the premises of the plaintiffs referred to were, but there is not a syllable of testimony showing it. There is not a line of testimony showing even that plaintiffs were in possession of the land from which the hay was cut, but the evidence does show that the hay was cut from a territory about four miles long and two and one-half miles wide, and adjoining the railway of defendants and on the east thereof. The testimony all shows that this land from which the hay was cut was open prairie land; and one of the plaintiffs, viz: Ben F. Lafyette, himself testified (T. R. 90) as follows:—

"Q. Where was this hay cut from? A. The vicinity of Wagoner.

Q. Was it from grass that was grazed upon by cattle during the year or was it from enclosed fields. A. It was out on the prairie, sir.

Q. The cattle did graze on it, roaming over the public domain? A. If cattle grazed upon it there would not have been any hay to cut.

Q. Was it out on the open lands near Wagoner? A. Yes, sir.

Q. Where cattle free to graze upon it? A. Yes, sir."

Section 2 of Article 5 of the Laws of the Creek Nation, which were offered in evidence, provides:

> "No non-citizen licensed trader who has not intermarried with a citizen of this Nation shall be allowed to enclose more than than 2 acres of our public domain, nor be allowed to cut and put up hay from our com mon pasturage; and any non-citizen not intermarrie-

> licensed trader found cutting and putting up hay from the common pasturage shall be fined ten dollars per acre for each acre so cut and put up."

This statute certainly shows that the plaintiff Lafayette, who was a white man and not intermarried with an Indian woman of the Nation, but a licensed trader therein, had no authority whatever to cut and put up the hay in question. This plaintiff evidently realized the situation he was in, and attempted to evade this law by the contract which he made with the plaintiff Mrs. Hailey, who was a married Creek Indian woman. That contract was offered in evidence against defendant's objection. (T. R. 76). The contract provides that Mrs. Hailey should cut and deliver 2000 tons of hay at Wagoner, I. T., and that Lafayette should furnish all the money incident to the cutting and delivering, Mrs. Hailey and Lafayette to share in profits 1-3 and 2-3 respectively.

Besides, this contract was not made in conformity with Sec. 2103 R. S. U. S., which requires among other things that all contracts made with individual Indians to be executed before a judge of a court of record and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs, and makes all contracts not so made absolutely null and void. The title to the land from which this hay was cut was in the Creek Nation as a nation, it being open land and not enclosed or in the possession of Mrs. Hailey. Article 3 of the treaty between the United States and the Creek Nation 1830 reads:—

> "The United States will grant a patent in fee simple to the Creek Nation of Indians for the land assigned said Nation by this treaty or convention, when ever the same shall have been ratified by the President and Senate of the United States; and the right thus guaranteed by the United States shall be continued to said

> Tribe of Indians so long as they shall exist as a Nation and continue to occupy the country hereby assigned to them."

Patent to Creek or Muskogee Nation, as such issued August 11, 1852.

The title thus being in the Creek Nation, it and it alone is presumptively in the possession of and the owner of the same; 2 Watterman on Trespass, 357.

Before plaintiffs could recover for the destruction of the hay they must prove title to the hay or the land from which it was cut, or lawful possession of the land from which it was cut from which title might be presumed. Reed *v.* C. M. & St. P. R. R., 32 Am. & Eng. R. R. Cas. 320; Karner *v.* C. & M. St. P. R. R., 45 N. W. 713. Plaintiff did not allege or show he was in possession of land from which hay was cut.

Where a trespasser enters upon land and cuts grass therefrom and makes hay he does not thereby become the owner of the same. Bulliss *v.* C. M. & St. P. R. R., 39 N. W. 245. When it is shown as in the case at bar that the hay was cut from the public Indian lands the presumption arises that the hay was not the property of plaintiffs.

Nor does a person who enters upon the land of another without license, and cuts grass therefrom and makes hay, acquire title therein. Murphy *v.* Sioux C. & P. R. R. Co., 55 Ia. 473.

In that case the court said: —

> "As the plaintiff did not own the land upon which the hay was stacked he had no constructive possession of it, having neither title nor possession, it seems to be a necessary consequence that he cannot recover. A mere trespasser does not acquire by his trespass constructive possession. * * * If the plaintiff could

> not recover if one had hauled the hay in question away and appropriated it *a fortiori* he cannot recover for a mere negligent act resulting in its destruction. If plaintiff should recover the value of the hay in question, the defendants could not plead the recovery a bar to an action by the real owner. The fact that a recovery by the holder of a mere colorable title is no bar to a recovery by the real owner demonstrates that none but the real owner can recover."

The Circuit Court of Appeals erroneously decided there was no evidence showing that the hay was cut on the common pasturage of the Nation, and further erroneously held that as Mrs. Hailey was a member of the Creek Nation she "certainly held the land where the hay was harvested, "as a tenant in common with other members of the Creek "Nation, even if it was not gathered on lands of which she "was the sole occupant, according to the usages and customs "of her tribe." Under the laws and customs of the Creek Nation, of which this court will take judicial notice, members thereof are only permitted to take exclusive possession of so much land as they may need for *actual cultivation*, and any citizen, head of a family, is further permitted to fence for pasture a tract of land not exceeding one mile square (p. 172 Compiled Laws Creek Nation, 1890). Mrs. Hailey was not the head of a family, nor was this ground inclosed or used as a *pasture*. All other lands of the Creek Nation, — that is, lands not in cultivation or fenced for pastures as permitted, are in possession of the Creek Nation as a nation, and no individual Creek citizen can complain of an injury to this general property of the Nation. Such a relation as tenants in common amongst the members of the Creek Nation with reference to their lands is unknown. It might as well be said that the citizens of the United States are tenants in common of its public domain as to say that the members of the Creek Nation are tenants in common of

any lands, the exclusive title and possession to which is in the Creek Nation. The grant of these lands to the Creek Nation under treaty was made to the Creek Nation in its tribal capacity and not to the Creek Indians as individuals. U. S. *v.* Joseph, 94 U. S. 614; Ex parte Crow Dog, 109 U. S. 556; U. S. *v.* Hunter, 21 Fed. Rep. 615. The right of occupancy of tribal lands is in the tribe or nation, and it has been the policy of the general government to recognize the right of the Indian governments to regulate their own right of occupancy of tribal lands. 18 Opinions of Attorneys-General, 36. And it is the duty of courts to give effect to the tribal regulations governing the occupancy of such lands. Gray *v.* Coffman, 3 Dill. 393; United States *v.* Cox, 18 How. 100.

Certain it is that there was such a conflict of testimony as to the ownership of the land, and consequent ownership of the hay in question, as made it error for the trial court to refuse to give the following instruction, which was requested by the defendants: —

> "The court instructs the jury that if you find from the evidence in this case that the hay claimed by the plaintiffs to have been burned by sparks cast out from the fire of one of defendant's engines, was cut upon the public domian or open lands of the Creek Nation and not upon land owned or possessed by plaintiffs or either or both of them and that said hay was so cut on the said public domain or open lands of the Creek Nation without the consent of the said Creek Nation or its officers or agents, then the plaintiffs cannot recover in this action."

In a quite similar case,— Murphy *v.* Sioux C. & P. R. R., 55 Iowa, 473, the court held that a refusal to give such an instruction was erroneous, and this holding was afterwards approved in Lewis *v.* C., M. & St. P. R. R., 57 Ia. 127.

VII.

The trial court erred in directing the jury that if they should find for the plaintiff, in arriving at the measure of damages they should find the value of the hay when burned, together with interest at six per cent per annum from the date of the destruction of the hay.

That the giving of this instruction was erroneous was admitted by the United States Circuit Court of Appeals, but that court refused to disturb the verdict by reason thereof, saying *it was quite evident from the record that the jury estimated the value of the hay at four dollars per ton, and did not in fact award interest.* In cases like this it is not only usual, but invariably the practice, to leave the allowance or non-allowance of interest to the discretion of the jury.

Lincoln *v.* Claflin, 7 Wal. 132;
Raennslaer Glass Factory *v.* Reed, 5 Cowan, 587;
Beals *v.* Gernsey, 8 Johns. 446;
Docks *v.* Day, 3 Wendell, 356;
Sedgwick on Damages, 7 Ed. 189–90–91.

The verdict in this case was a general verdict, and it is impossible for any court to undertake to determine how the jury arrived at their verdict, or upon what calculation the amount of the same was based. No court can determine what effect a misdirection had upon a verdict. 2 Thompson on Trials, 1755; Beaver *v.* Taylor, 1 Wal. 677.

Where there is a general verdict and an erroneous instruction is given it can only be corrected by a new trial. New Orleans Insurance Association *v.* Piaggio, 16 Wal.

378. Where it appeared that the amount of money assessed by the jury in their verdict was a proper amount to have been agreed upon by the jury, yet there had been an erroneous instruction on the part of the lower court, and the verdict was general, this court declared that they could not determine what influence the erroneous instructions of the lower court may have had upon the deliberations of the jury. Smith *v.* Bolles, 132 U. S. 125.

In Glaspell *v.* Northern Pacific R. R. Co., 43 Fed. Rep. 900, where the instructions of the court as to the measure of damages, were erroneous and the verdict was general, it was said the verdict could not be sustained even though the amount of the verdict was probably correct and the court would not hear affidavits of jurors to show that they had not been influenced by the erroneous instructions as to the measure of damages in arriving at their verdict.

There was nothing in this case to justify the United States Court of Appeals in finding that the jury was not controlled by this erroneous instruction. The United States Court of Appeals was evidently misled by the apparent fact that the value of the hay, as stated in the plaintiffs' petition, $4.00 per ton, multiplied by the number of tons sued for, would result in the amount of damages assessed by the jury, but as to this that court was wrong. The amount of hay sued for was 666 1-2 tons, and the value of the same was alleged to be $4.00 per ton, making a total of $2,666, which was the sum named in the complaint; but the verdict was for $2,664. If we are to guess at how the jury have arrived at its verdict may it not have been in the following manner: The jurors compromised as to the number of tons of hay which were burned, and instead of finding that there were 666 1-2 tons, as alleged, burned, they simply allowed for 600 tons, which, multiplied by $4.00, the value of the hay alleged, gave $2,400, and then they allowed interest upon that sum for

twenty-two months, from the date of fire until trial, at six per cent, under the instruction of the court, which gives the amount they returned a verdict for.

We have urged the most material and important errors shown, according to our view, by the record. We present them to the consideration of the court respectfully submitting that the judgments of the courts below should be reversed.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

HENRY C. ROUSE, Receiver *de bonis non, vice* Eddy & Cross, deceased, Receivers of Missouri, Kansas & Texas Railway,
Plaintiff in Error,
vs.
BEN F. LAFAYETTE and SALLIE M. HAILEY,
Defendants in Error.
} *No. 130.*

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR.

By WILLIAM T. HUTCHINGS.

The Phoenix Printing Co., Printers and Stationers, Muskogee.

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BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR.

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The authorities cited by plaintiff in error apply to the ancient practice of the common law, where the original writ was the basis of the action, and where the declaration was not filed until the next rule day.

The code practice was adopted in Arkansas in 1868, and it was that practice we were following when this suit was instituted. Under it the complaint is the basis of the action and the summons a mere order to come into court and answer the complaint.

Section 4968, *Mansfield's Digest of Arkansas*, gives the essential requisites of a summons. The summons in this case not only complies with that law, but is word for word the same as those that have for thirty years brought defendants to the bar of Federal and State courts in Arkansas, and no one in all that time has ever before had the temerity to question their sufficiency.

Not only is this true, but the Supreme Court of Arkansas has held that the defendant is properly before their courts when brought there in obedience to a writ of attachment containing a summons clause.

Rice v. *Dale*, 45 *Ark.*, 34.

Gulf, C. & S. F. Ry. Co. v. *Jamei*, 1 *C. C. A.*, 53.

The summons being that prescribed by law, was it properly served on the defendants?

It is not contended that such service would not have been valid as against the railroad company had it not been in the

hands of the receivers. The railroad corporation was being operated in all respects through agents as it was before it went into the hands of the receivers, and in running it they simply represented the company. They were liable in their official capacity for the acts of their agents, the same as the corporation itself would have been. This was a suit against a corporation in the hands of receivers—officers of the court and not individuals and the capacity of its agents for service continued.

McNulta v. *Lochridge*, 141 *U. S.*, 327.

Cent. Trust Co. v. *St. L. A. & T.*, 40 *Fed.*, 426.

The appearance of the receivers waived the defect in the summons, if any existed. The case of *Harkness* v. *Hyde*, 98 *U. S.*, 476, is easily distinguished from the one in hand. That was a suit for damages, in which summons, with the copy of the complaint, was served by the sheriff on the defendant at his residence "on the Indian Reservation," which the Court finds was "beyond the jurisdiction, legislative or judicial, of the government of Idaho." Such a proceeding was of course declared illegal and not to be waived. A contrary rule would be a limitation upon the jurisdiction of Federal courts and deprive the party of the right to have reviewed one of the most important questions in his case. In that case and the others that have followed it, the territorial dominion or domination over the defendant is denied, it was an endeavor to establish a legal right by unlawful means. In this case the plaintiffs in error were exercising their franchises and committed the injury within the territorial jurisdiction of the lower court, and the agent upon whom the

process was served resided and had his office and station there, and was actually served there. The only limit upon the jurisdiction of the lower court was where the sole parties were Indians by blood, and in trying the case it was not encroaching upon the rights of any other tribunal, State, territorial or Federal. It would not be contended that if the service had been had on the receivers themselves at the same time and place it was had on their agents that they could have made any objection to it; therefore, when they answered to the merits, they only voluntarily placed themselves where they could legally have been placed and where they would have been had process been executed on them personally. There was no pretense in the cases decided by this court that there was or could have been any service of process within the territorial jurisdiction of the lower court.

Mexican C. Ry. Co. v. *Pinkney*, 149 *U. S.*, 209.

McCormick Harvesting M. Co. v. *Walthers*, 134 *U. S.*, 41.

When the lower court overruled the objection, the election to go into the merits and not stand upon their objection waived the exception.

Eddy v. *LaFayette*, 1 *C. C. A.*, 444.

Railway Co. v. *Whitley*, 77 *Tex.*, 127; 13 *S. W.*, 853.

Stevens v. *Harris*, 99 *Mich.*, 230.

Sears v. *Bird*, 78 *Cal.*, 226.

Thayer v. *Dove*, 8 *Blackf. (Ind.)*, 567.

Ruby Chief Min. Co. v. *Gurley*, 17 *Colo.*, 199.

Walker v. *Turner*, 27 *Neb.*, 103.

Stevens v. *Bradley*, 23 *Fla.*, 201.

II.

THE COMPLAINT STATES A GOOD CAUSE OF ACTION.

No objection was made to the complaint in the court below, nor in the Circuit Court of Appeals, and it is therefore here attacked for the first time. To make it amenable to an objection at this time, it must wholly fail to state a cause of action. There is a vast difference between a complaint which defectively alleges facts and one that omits a fact or facts essential to the existence of a cause of action.

If the complaint is defective in the particular urged, it was cured by the verdict.

Lassiter v. *Jackmon*, 88 *Ind.*, 118.

But the complaint charges actionable negligence against the defendants. The only cases holding the contrary, even when the question was raised in the lower court, are those from Indiana cited in brief of plaintiffs in error. Those cases are discussed and distinguished in.

Hungen v. *Chicago, M. & St. P. Ry. Co.*, 3 *So. Dak.*; 53 *N. W.*, 769.

Similar allegations in complaints have been held good in

Black v. *Aberdeen & W. E. Ry Co.*, 115 *N. C.*, 667; 20 *S. E.*, 713.

Railway Co. v. *Harmann*, 87 *Ind.*, 422.

III.

The following instruction of the court below complained of states a sound proposition of law:

"The Court further instructs the jury that evidence showing that the fire originated from sparks of a passing engine is a *prima facie* proof of negligence, and the burden shifts on the railway company to show that it was of no negligence."

Counsel have argued more seriously and more at length this proposition than any other. However important the subject may be and however egregious the error of the Court may have been, no exception was taken to it in the lower court, no error was assigned on it in the Circuit Court of Appeals, nor was it argued at all there. Indeed, counsel has spent much valuable time in discussing an error not even assigned in this court, as error was only assigned as to paragraphs 5, 10, 13 and 14 (*see Rec., p.* 194) of the charge of the Court below.

IV.

THE TRIAL COURT PROPERLY PERMITTED PLAINTIFFS TO AMEND THEIR COMPLAINT BY STRIKING OUT THE ALLEGATION AS TO ENGINE NO. 63.

Counsel have set forth in their brief the law in force in the Indian Territory relative to amendments, than which there could not well be one more liberal. To seriously urge this proposition seems to us to border on the ridiculous. We are usually surprised by unexpected events and incidents

which we could not be expected to have anticipated. They say they were surprised at our inability to prove that engine No. 63 set fire to our hay, when they were well aware that on that very same day that engine was in their shops undergoing repairs.

The amendment neither changed substantially the claim or defense.

A material allegation is one that is necessary to a proper statement of the cause of action. It is an allegation that must be substantiated by evidence, or else the plaintiff fails in this suit.

That the direction in which the engine was going, the character of the train it pulled and its number are not material allegations has been decided frequently.

Hoskison v. *Central Vermont R. Co.*, 66 *Vt.*, 618.

Railroad Co. v. *Richardson*, 91 *U. S.*, 454.

Union Pac. Ry. Co. v. *Keller*, 54 *N. W.*, 420.

Railroad v. *Noll*, 77 *Ind.*, 110.

8 *Amer. and Eng. Enc.*, *pp.* 7, 9.

V.

IT WAS THE DUTY OF THE RECEIVERS TO KEEP THEIR RIGHT OF WAY AND TRACK CLEAR OF COMBUSTIBLE MATERIALS.

Counsel again in this connection have fallen into the error of urging an error not assigned in this court. Exception was

taken to the 12th paragraph of the Court's charge, and error was assigned in the Circuit Court of Appeals but not in this court. Paragraph 10, excepted to and properly assigned as error, is as follows:

"The Court instructs the jury that evidence of the railway company allowing combustible materials to accumulate upon its track and right of way, which is liable to take fire from sparks escaping from passing engines and communicate it to adjacent property, is sufficient to warrant the jury imputing negligence to the company."

This instruction correctly states the law.

Pittsburg Ry. Co. v. *Jones*, 86 *Ind.*, 496; 44 *Amer. R.*, 334.

Tilley v. *Railway Co.*, 49 *Ark.*, 536.

Black v. *Railway Co.*, 115 *N. C.*, 667.

Briant v. *Railway Co.* (*Mich.*), 62 *N. W.*, 365.

Mo. Pac. Ry. v. *Ayers*, 8 *S. W.* 538.

VI.

The Contract Between the Plaintiffs was Valid and Gave Them a Right Action for Their Injury.

Mrs. Hailey was a Creek Indian by blood, and, under the laws and customs of the Creeks, had a right to cut hay from the public domain. *Sec.* 2103 *Rev. St. U. S.*, cited in this

connection, has no application whatever to this case. That law was passed to prevent congressional lobbyists from making contracts with Indians with reference to land claims and annuities, which business at one time had reached the point of a national shame and nuisance. No matter what the title of the Creeks may be, or however invalid such contracts may be, it does not lie in the mouth of this wrongdoer to make any such defense. The receivers could set up no title to the land or hay, and cannot therefore question that of plaintiffs.

Northern Pac. R. Co. v. *Lewis*, 2 C. C. A., 446.

McClellan v. *Railway Co.*, 59 N. W., 978.

VII.

DID THE COURT ERR IN DIRECTING THE JURY TO ALLOW INTEREST?

We can add nothing to the remarks of the eminent Judge who handed down the decision in this case in the Circuit Court of Appeals, and will only cite a few cases in support of the instruction.

St. L., I. M. & S. Ry. v. *Biggs*, 50 *Ark*, 176.

Paris v. *Ice Co.*, 46 *N. Y.*, 361.

1 Sedgwick on Dam., 8th Ed., Sec. 317.

Regan v. *N. Y., etc., Ry. Co.*, 60 *Conn*, 124.

Fremont R. R. Co. v. *Marley*, 25 *Neb.*, 138.

Kendrick v. *Towle*, 60 *Mich.*, 363.

Respectfully submitted.

WILLIAM T. HUTCHINGS,

Attorney for Defendants in Error.

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Respectfully submitted.

WILLIAM T. HUTCHINGS,

Attorney for Defendants in Error.

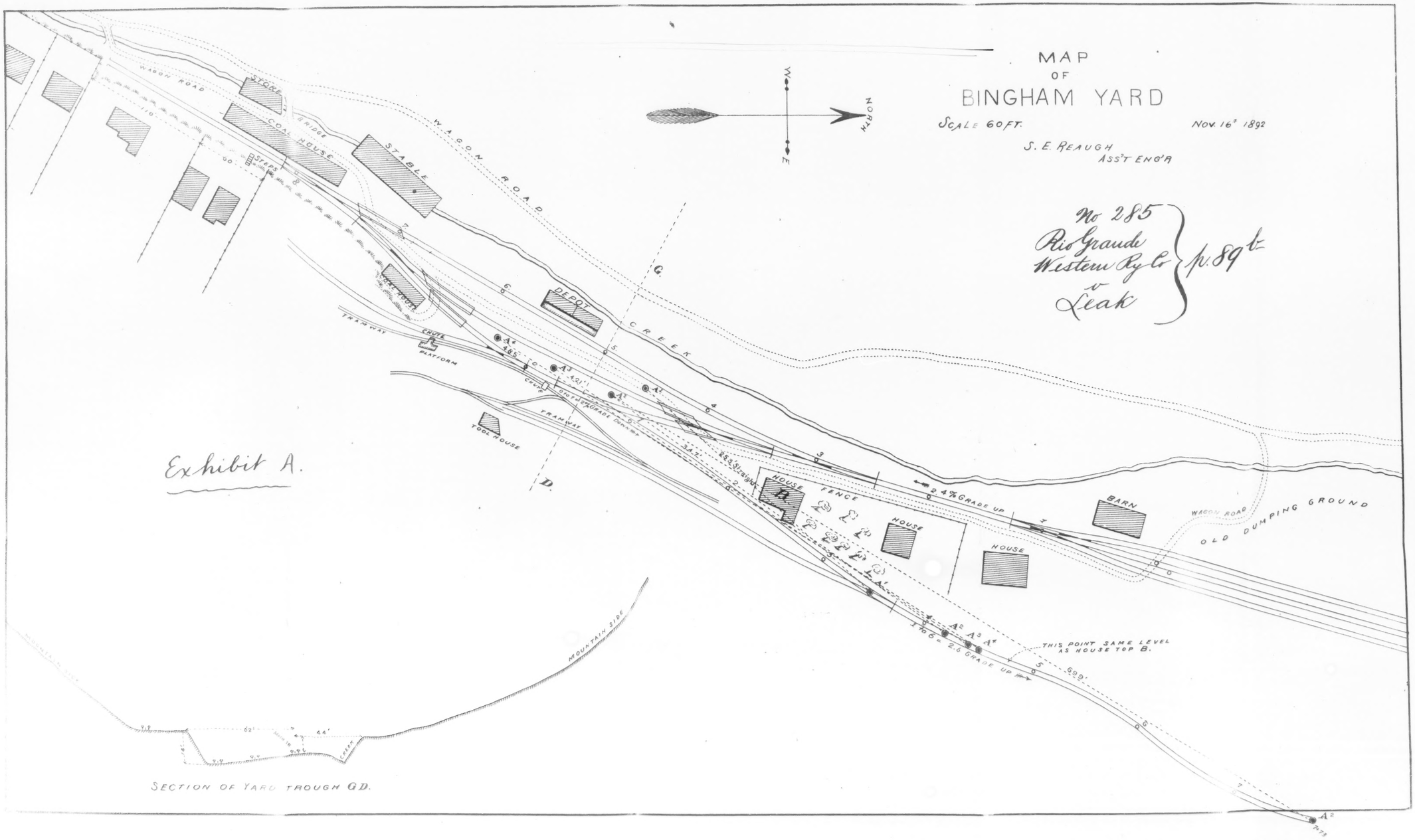
MAP OF BINGHAM YARD

SCALE 60 FT. Nov. 16th 1892

S. E. REAUGH ASS'T ENG'R

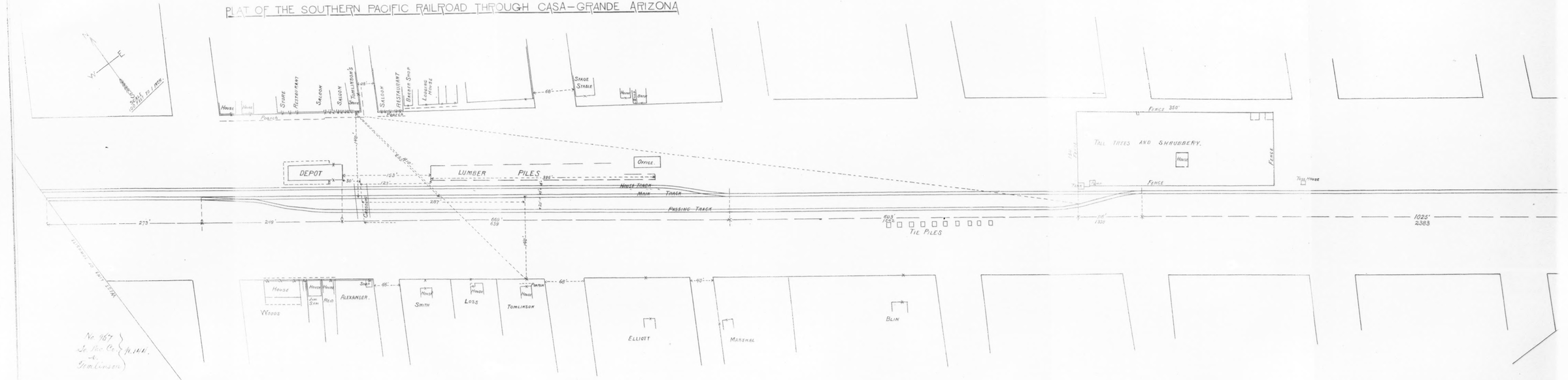
No 285
Rio Grande Western Ry Co
v
Leak
} p. 89

Exhibit A.



SECTION OF YARD THROUGH GD.

PLAT OF THE SOUTHERN PACIFIC RAILROAD THROUGH CASA-GRANDE ARIZONA



RAILROAD THROUGH CASA-GRANDE ARIZONA